

No. 16400

VOL 3109

United States
Court of Appeals
for the Ninth Circuit

ELSIE SUMMERS,

Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership and HUBERT E. BONEBRAKE, M.D., individually,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Northern Division

FILED

AUG 21 1959

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Additional Designation of Record on Appeal (Appeilees-USCA)	173
Answer	10
Appeal:	
Additional Designation of Record on (USCA)	173
Certificate of Clerk to Transcript of Record on	19
Designation of Record on (USCA).....	171
Notice of	17
Statement of Points on (USCA).....	166
Undertaking on	18
Certificate of Clerk to Transcript of Record...	19
Complaint	3
Depositions:	
Bonebrake, Hubert E., M. D.....	21
—direct	24

Depositions—(Continued):

Cordwell, Dr. R. W.....	68
—direct	69
—cross	80
—redirect	92
—recross	93
—re-redirect	94
—re-recross	96
Ellis, Dr. Paul M.....	97
—direct	98
Summers, Elsie	101
—cross	102
Designation of Record on Appeal (Appellant's- USCA)	171
Judgment	16
Minute Orders:	
Nov. 10, 1958 — Motion to Restrict Evidence Overruled and Motion to Publish Deposi- tions Granted	15
Nov. 12, 1958—Motion For Directed Verdict For Defendants Granted.....	15
Motion to Dismiss.....	8
Motion to Limit Evidence, etc.....	13
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	17
Order Overruling Motion to Dismiss.....	8
Statement of Points on Appeal (Appellant's- USCA)	166

Transcript of Proceedings and Testimony.....	150
Instructions to Jury to Render a Verdict For Defendants	164
Plaintiff's Offer of Proof.....	163
Witness:	
Summers, Elsie	
—direct	151
Undertaking on Appeal.....	18
Verdict	16

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In the United States District Court, District
of Idaho, Northern Division

Civil Action No. 2115

ELSIE SUMMERS,

Plaintiff,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HU-
BERT E. BONEBRAKE, and LEWIS B.
HUNTER, a co-partnership and HUBERT E.
BONEBRAKE, M.D., individually,
Defendants.

COMPLAINT

Plaintiff complains and for cause of action
against the defendants alleges:

I.

That plaintiff, Elsie Summers, is a citizen and
resident of the State of Montana; that defendants
are citizens and residents of the State of Idaho; that
the amount involved in this controversy, exclusive
of interest and costs, exceeds the sum of three thou-
sand dollars.

II.

That at all times herein mentioned, the defend-
ants Paul L. Ellis, Hubert E. Bonebrake and Lewis
B. Hunter were, are and continue to be a co-
partnership, engaged in business at Wallace, in the
State of Idaho, of operating and conducting a hos-

pital for the care and treatment of human beings who are ill and in need of medical care, hospitalization, surgery, X-ray and nursing services and said defendants are thus engaged for profit, duly licensed as such and using the name and style of "Wallace Hotel."

III.

That, at all times herein mentioned the defendant, Dr. Hubert E. Bonebrake, was, he is and continues to be a duly licensed and practicing Doctor of Medicine in the State of Idaho.

IV.

That on or about the 28th day of March, 1952, the exact date now being unknown, and the defendants, after repeated demands, refusing to supply the information to plaintiff, but which date plaintiff will definitely obtain by the discovery process of this Court and now asks leave to insert the correct date herein when it is obtained, plaintiff engaged the services of the defendants to perform surgery upon her and furnish surgical, medical and hospital services to plaintiff in and about repair and treatment to plaintiff's uterus and female organs and the defendants undertook to furnish surgical, medical, nursing and hospital services and did furnish and perform such services for plaintiff.

V.

That said defendants negligently and carelessly conducted and performed said operation on the per-

son of the plaintiff through her abdomen and they negligently and carelessly did not exercise in plaintiff's case the reasonable and ordinary care and diligence ordinarily exercised by the physicians and surgeons in the City of Wallace and in the State of Idaho but did not exercise any reasonable care or ordinary care or diligence whatsoever and they should have and could have exercised in plaintiff's case and they negligently and carelessly left an operating and surgical needle in the abdomen of the plaintiff and in the vicinity of plaintiff's female organs and exact portion thereof being to plaintiff unknown and parts of plaintiff's were cut, bruised and scarred by said surgical needle and the tissues and tendons, flesh and parts of plaintiff's body were damaged—all as the proximate result of the defendants' negligence as aforesaid.

VI.

That subsequently plaintiff on several occasions returned to the defendants complaining of severe pain, soreness and agony in the area where they had operated on plaintiff and submitted herself to them for examination and said defendants negligently and carelessly failed to use ordinary care and negligently failed to use facilities which they had, such as would have been used by persons of like training and experience in the vicinity of Wallace, Idaho and thus negligently failed to discover said surgical needle and as the proximate result of said further negligence of defendants plaintiff continued to suffer great mental worry and extreme

pain and suffering and finally, plaintiff sought other physicians and surgeons and other hospitalization in the vicinity of Wallace, Idaho, and on August 5th, 1955, plaintiff discovered that a foreign substance was imbedded in her abdomen which appeared to be a surgical and operating needle and plaintiff, immediately thereafter and on or about August 9th, 1955, plaintiff necessarily was required to submit to a further operation for the removal of said surgical needle and the said needle was removed from her person.

VII.

That as the proximate result of the aforesaid negligence of the defendants plaintiff has been made to suffer great mental and physical distress, pain and worry and she alleges on her information and belief that she has been permanently injured all to her great damage in the sum of fifty thousand dollars.

VIII.

That further plaintiff has been required to incur, expense for medical services, physicians' services, hospitalization, X-rays and laboratory examinations reasonably required to be incurred by reason of her injuries and the negligence of the defendants and on her information and belief she alleges that she will require additional services in the future of like nature and the amount thereof is at present unknown but plaintiff alleges on her information and belief that it will amount to at least the sum

of \$2500.00 and she has been further damaged in said sum of \$2500.00; that said sum is a reasonable amount incurred and to be incurred for such services.

IX.

That plaintiff is informed and believes and therefore alleges that in the further treatment of her injuries aforesaid she will be required to lose wages from her earnings as a practical nurse from which she earns and is capable of earning the sum of \$7.00 per day but at the time of the filing of this complaint no accurate estimate of the amount of such loss can be anticipated and plaintiff asks leave to insert in this complaint by amendment the amount thereof when it is ascertained.

Wherefore plaintiff prays judgment for the sum of fifty-two thousand five hundred dollars, against defendants, and for costs of suit, and for such other and further relief as to the court seems meet, just and proper in the premises.

/s/ JAMES W. INGALLS,
DOEPKER AND HENNESSEY,
of the Bar of Montana,

/s/ By MARK J. DOEPKER,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 29, 1957.

treated. She was thereby lulled into a sense of security. There is no showing in the Trimming case that the plaintiff therein was under such continuous treatment by the defendant doctor.

For this reason it is hereby Ordered that the Motion to Dismiss be, and the same is hereby, Overruled. Defendants may have ten days in which to file their answer.

Dated this 5th day of February, 1958.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed February 6, 1958.

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Wallace Hospital, Paul M. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership, with Hubert E. Bonebrake, M.D., individually, and in answer to the Complaint, admit, deny and allege as follows:

I.

The defendants admit jurisdiction of the Court herein, but have no knowledge, information or belief as to the residence of the plaintiff, Elsie Summers, and therefore deny the same.

II.

The defendants deny Paragraph II of plaintiff's Complaint.

III.

The defendants admit Paragraph III of plaintiff's Complaint.

IV.

These defendants deny Paragraph IV of said Complaint. In further answer thereto, said defendants allege that on the 25th day of March, 1951, the plaintiff entered the Wallace Hospital, for surgical treatment, under the care of defendant, Hubert E. Bonebrake, M.D. On the 26th day of March, 1951, the defendant, Bonebrake, did perform surgery upon the plaintiff, performing a hysterectomy, appendectomy, and further correcting an Ectopic tubal pregnancy. That all such services, surgery and care were performed with due care and diligence as exercised by that degree of skill ordinarily exercised in and about the City of Wallace, State of Idaho.

V.

Answering Paragraph V of plaintiff's Complaint, these defendants deny each and every allegation therein contained. Further answering said Paragraph V, these defendants allege that said surgery was prudently, carefully and with due medical diligence performed and carried out, and that these defendants exercised the required degree of skill in so doing. That if a needle, as alleged, was left

within the plaintiff, it was as a result of pure accident and not as a result of negligence.

VI.

Answering Paragraph VI of this Complaint, these defendants deny each and every allegation therein contained.

VII.

Answering Paragraph VII of plaintiff's Complaint, these defendants deny each and every allegation therein contained.

VIII.

Answering Paragraph VIII of plaintiff's Complaint, these defendants deny each and every allegation therein contained.

IX.

Answering Paragraph IX of plaintiff's Complaint, these defendants deny each and every allegation therein contained.

Affirmative Defense

I.

As affirmative defense these defendants allege that said plaintiff was never treated subsequent to March 26, 1951, for any complaint relative to said operation or surgery, and alleges that said defendants, Paul M. Ellis, Wallace Hospital and Lewis B. Hunter, never treated or saw said plaintiff for

any purpose within two years subsequent to March 26, 1951, and that said statute of limitations for the bringing and maintaining of said suit has run and did run on the 26th day of March, 1953.

Wherefore, defendants pray that said Complaint be dismissed, that the plaintiff take nothing and that these defendants have their costs and expenses herein incurred.

Dated this 20th day of February, 1958.

HAWKINS & MILLER,
/s/ By E. L. MILLER,
Attorneys for Defendants.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 22, 1958.

[Title of District Court and Cause.]

MOTION

Comes now the defendants in the above captioned matter and moves the Court and the Judge thereof in the above captioned matter as follows:

I.

Whereas, the defendants did heretofore under Rule 9F and Rule 12B 6 and Rule 56 move to dismiss the complaint herein for failure to state a claim upon the grounds that no relief could be granted in that said action was barred by the statute of limitations, and,

II.

Whereas, said Court did thereafter deny said motion without prejudice upon the grounds that there were allegations of continuing treatment, Now, Therefore, without waiving any of the rights of said defendants as appears from the records of said action and without waiving said prior motion, the defendants now move the Court as follows:

1. That evidence during the course of said trial now set for November 17, 1958, at 10:00 a.m. be restricted and limited to those acts and actions of the defendants, or any of them, which occurred within two (2) years from the institution of said suit being between the dates of July 30, 1955, and July 30, 1957.

2. Defendants further move that any right to recovery by the plaintiff herein be likewise restricted and predicated upon such acts and actions of negligence, if any, of said defendants and each and all of them within said period above set forth.

Dated this 3rd day of November, 1958.

HAWKINS & HAWKINS,
/s/ By E. L. MILLER,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 4, 1958.

[Title of District Court and Cause.]

MINUTE ORDER

(Judge Clark)

(November 10, 1958)

This cause came on regularly this date in open court for hearing on defendants' motion for Restriction of Evidence and motion to publish all depositions, etc., James Ingalls appearing as counsel for the plaintiff and E. L. Miller appearing as counsel for the defendants.

After a discussion between the court and respective counsel, it was ordered that the motion to Restrict Evidence be overruled without prejudice and the motion to examine and publish all depositions be granted.



[Title of District Court and Cause.]

MINUTE ORDER

(Judge Clark)

(November 12, 1958)

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.

After a statement of plaintiff's cause by its counsel, Elsie Summers was sworn and testified as a witness on the part of the plaintiff, and other evidence was introduced.

Comes now counsel for the defendants and moves

the Court for a directed verdict in favor of the defendants and against the plaintiff. Good cause appearing, the motion was granted. Thereupon, the Court directed the jury to find for the defendants and against the plaintiff, and the jury having done so, the Court ordered the verdict recorded, which was in the words following:

[Title of Court and Cause.]

VERDICT

“We, the jury, find for the defendants and against the plaintiff. Dated November 12, 1958. Chester E. Rich, Foreman.”

Whereupon, judgment was entered in conformity with the verdict.

In the District Court of the United States for the
District of Idaho, Northern Division

No. 2115

ELSIE SUMMERS,

Plaintiff,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE, and LEWIS B. HUNTER, a co-partnership and HUBERT E. BONEBRAKE, M.D., individually,

Defendants.

JUDGMENT

This cause came on for trial before the Court and jury, both parties appearing by counsel, and

the Court on Motion of counsel for the defendants having directed the jury to render a verdict for the defendants, and the jury having done so,

It is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing and that the defendants have and recover from the plaintiff its costs and disbursements incurred herein, taxed in the sum of \$.....

Witness, The Honorable Chase A. Clark, Chief Judge of said Court, and the Seal thereof, this 12th day of November, 1958.

[Seal] ED. M. BRYAN,
Clerk,
/s/ By PAUL BOYER,
Deputy.

[Endorsed]: Filed November 12, 1958.



[Title of District Court and Cause.]

NOTICE OF APPEAL

To Wallace Hospital, Paul L. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership, and Hubert E. Bonebrake individually, and E. L. Miller, Attorney for the Above-Named Defendants:

Notice Is Hereby Given that Elsie Summers, the plaintiff above named, does hereby appeal to the United States Circuit Court of Appeals for the

9th Circuit from the final judgment entered in this action on the 12th day of November, 1958.

Dated this 10th day of December, 1958.

DOEPKER & HENNESSEY,
JAMES W. INGALLS,
/s/ By JAMES W. INGALLS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 10, 1958.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, Elsie Summers, the plaintiff in the above-entitled action, desires to appeal to the Circuit Court of the United States for the Ninth Circuit from a judgment entered against her in the said action on the 12th day of November, 1958, and to give an undertaking under Rule 73(B) of the Federal Rules of Civil Procedure,

The undersigned surety company, duly qualified as such under the laws of the State of Idaho, does hereby undertake under said statutory obligation and promise on the part of the appellant that said appellant will pay all costs that may be awarded against the said appellant on the appeal, or a dismissal thereof, not exceeding \$250.00, to which amount it acknowledges itself bound.

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached, this 10th day of December, 1958.

[Seal] GLEN FALLS INSURANCE
 COMPANY,
 /s/ By WILLIAM P. QUARLES,
 Attorney-in-Fact.

State of Idaho,
County of Kootenai—ss.

On this 10th day of December, 1958, before the undersigned Notary Public in and for the said County and State, personally appeared William P. Quarles, known to me to be the Attorney-in-fact for the Corporation executing the foregoing instrument and acknowledged to me that on behalf of said Corporation he executed and affixed the seal of said Corporation to the said instrument.

[Seal] /s/ W. L. MARTIN,
Notary Public for Idaho, residing at Coeur
d'Alene; Com. Exp. 6-20-60.

[Endorsed]: Filed December 10, 1958.

[Title of Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby

certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint
2. Motion to Dismiss
3. Order overruling motion to dismiss
4. Answer
5. Motion to limit evidence etc.
6. Minutes of the Court of Nov. 10, 1958 overruling Motion to limit evidence etc.
7. Minutes of the Court of Nov. 11, 1958
8. Minutes of the Court of Nov. 12, 1958, including Motion for a directed verdict and order granting said motion
9. Verdict
10. Judgment
11. Notice of appeal
12. Undertaking on Appeal
13. Statement of Points on Appeal
14. Order Extending Time for Appeal
15. Designation of Contents of Record on Appeal
16. Additional Designation of Record on Appeal
17. Transcript of Trial, including instructions to the jury for a directed verdict, and plaintiff's offer of proofs.
18. Deposition of Hubert E. Bonebrake, M. D.
19. Deposition of Dr. Paul M. Ellis
20. Deposition of Dr. R. W. Cordwell
21. Deposition of Elsie Summers
22. Amended Statement of Points on Appeal

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 27th day of January, 1959.

[Seal]

ED. M. BRYAN,
Clerk.

[Title of District Court and Cause.]

DEPOSITION OF
HUBERT E. BONEBRAKE, M.D.

Be It Remembered, pursuant to stipulation of counsel, the deposition of Hubert E. Bonebrake, M.D. was taken in the District Courtroom of the Shoshone County Courthouse, Wallace, Idaho on the 26th day of August, 1958 at the hour of 10:00 o'clock A.M., M.S.T. of said day. Present at the taking of said deposition were the following: Elsie Summers, plaintiff, with her attorneys of record, Mr. James W. Ingalls and Mr. M. J. Doepker; Hubert E. Bonebrake, deponent, with his attorney of record, Mr. E. L. Miller; Merle Myers, Deputy Clerk of the First Judicial District of the State of Idaho, before whom said deposition was taken, and Irene Vermillion, Court Reporter, who took said deposition down in shorthand and later transcribed the same into typewriting.

Whereupon the following proceedings were had and done, to wit:

Mr. Doepker: It is hereby stipulated, by and between the [1]* plaintiff, Elsie Summers, and the

* Page numbers appearing at bottom of page of Original Deposition.

(Deposition of Hubert E. Bonebrake, M.D.)
defendants, Wallace Hospital, Paul M. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership, and Hubert E. Bonebrake, M.D., individually, defendants, stipulating by and through their respective counsel of record, James W. Ingalls and M. J. Doepker and Maurice F. Hennessey, a law firm doing business and practicing in Montana under the name and style of Doepker and Hennessey, that the deposition of Dr. Hubert E. Bonebrake and Dr. Paul M. Ellis may be taken before the Deputy Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, at the hour of 10:00 o'clock A.M. of August 26, 1958 and continuing thereafter until said deposition is completed; that the deposition will be taken upon oral interrogatories directed to the defendants whose depositions are being taken and the interrogatories so propounded may be subject to any objections whatsoever upon the trial of the action to the same effect as if the witness were personally present and testifying therein, with the exception that objections as to the form of the interrogatories must be taken at the time of the taking of the deposition.

That said depositions are taken on behalf of plaintiff for the purpose of discovery and for the purpose of use at the trial or for any other purpose, particularly with respect to the right to use the deposition upon cross examination of the defendant without the plaintiff being bound by the testimony [2] thus given under the rules of Federal Proce-

(Deposition of Hubert E. Bonebrake, M.D.)

ture of this particular proceeding. And on behalf of the plaintiff, Elsie Summers, she is present here in the courtroom at the time of the taking of these depositions and by her counsel and, if required, on her own behalf, will waive any claim of privity or privilege between herself and any of the defendants with respect to the defendants as physicians and surgeons testifying upon any matter disclosed by reason of the professional relationship of doctor and patient and the plaintiff hereby offers to sign such waiver as may be required by the defendants in that particular.

That when said depositions are taken any exhibits that may be produced or offered in evidence at the trial may be included with the depositions or placed separately in an envelope so that contact prints of X-rays may be made by the Clerk of the District Court of Idaho in Boise, Idaho and that photographs of the exhibits may be prepared from any exhibits that may be offered at the time of taking such depositions and that they likewise may be separately enclosed for the same purpose of making copies so that after their use upon the trial, copies of the records may be substituted for the originals and, if deemed necessary, the originals may be returned to the records and files of the Wallace Hospital or the records and files of the defendants.

After said depositions are taken the defendants shall have the right to examine said depositions and to make any corrections [3] that they may deem appropriate after having examined the depositions,

(Deposition of Hubert E. Bonebrake, M.D.)

provided that such correction shall be separately listed and stated and signed in connection with the original deposition. That said depositions may be used by either party upon any trial or proceedings had in connection with the cause on trial, the title of which is included as a part of the depositions.

That the witnesses may be sworn by the Deputy Clerk of the Court in attendance and after said depositions are taken by the reporter, the same shall be transcribed by her and the depositions properly verified by the Deputy Clerk of the District Court according to the practice and rules of Federal Procedure and of the rules of the District Court of the District of Idaho.

Mr. Miller: I accept the stipulation.

HUBERT E. BONEBRAKE

called as a witness by plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Doepker): Will you please state your name, sir? A. H. E. Bonebrake.

Q. What, if any, business or profession are you engaged in at the present time?

A. I am a physician and surgeon.

Q. You are duly licensed to practice your profession in [4] the State of Idaho? A. I am.

Q. And are a graduate of what school?

A. University of Oregon Medical School.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. How long have you been practicing your profession in Wallace, Doctor? A. 21 years.

Q. Did you practice elsewhere besides in Wallace, Idaho? A. No.

Q. What is your specialty?

A. I have no specialty.

Q. Then you follow general practice, do you?

A. I do.

Q. And that includes surgery, does it?

A. It does.

Q. Have you practiced surgery in the State of Idaho besides here in Wallace? A. No.

Q. Do you practice surgery in the hospitals in the Coeur d'Alene district?

A. Just one hospital.

Q. Just the Wallace Hospital? A. Yes.

Q. Then directing your attention to the plaintiff here, Elsie Summers, who is seated here in the courtroom at this time, [5] was she at any time in the past your patient? A. Yes.

Q. And when did that doctor-patient relationship originate, please, if you recall?

A. March 14, 1951.

Q. March 14, 1951. In what hospital were you engaged in surgery? A. Wallace Hospital.

Q. We observe in the Answer which has been filed here by the defendants that an allegation which the plaintiff made in her complaint to the effect that the defendants, Paul M. Ellis, Hubert E. Bonebrake and Lewis B. Hunter were, are and continued to be the co-partnership engaged in busi-

(Deposition of Hubert E. Bonebrake, M.D.)

ness at Wallace in the State of Idaho of operating and conducting a hospital for the care and treatment of human beings who are ill or in need of medical care, hospital and surgery, X-ray and services and said defendants are thus engaged and duly licensed and using the name and style of Wallace Hospital. Is there something in those allegations that are incorrect, doctor? A. Yes.

Q. Will you please indicate what they are?

A. We were a partnership at that time. That allegation says we still are and continue to be. Dr. Hunter is no longer a partner.

Q. Then at the time involved, the inception of this treatment [6] of the plaintiff, you were a partnership at that time, were you? A. Yes.

Q. Dr. Hunter, is he no longer practicing medicine in Wallace or is he here?

A. That's right, he is not here.

Q. Where is Dr. Hunter at the present time?

A. Spokane, Washington.

Q. In view of your answer, Doctor, to the effect that your first contact with the plaintiff, Elsie Summers, in the capacity of physician and patient was in the year 1951, I presume that you do not, at this time, have an independent recollection of the details of that episode, do you? From your own memory, I mean. Is that correct?

A. I have a recollection.

Q. Do you think you have a recollection of all the details of it or would your mind be refreshed by the use of records that were kept at the time?

(Deposition of Hubert E. Bonebrake, M.D.)

A. I have a recollection of most of the details, however, I may have to use records for some of the details.

Q. May I inquire, please, whether you have here in court or whether you have here in Wallace records, that is, particularly the hospital records of the episode referred to in March of 1951?

A. I do.

Q. And the records that you have here, are they all of the [7] records connected with the matter of your surgical and doctor treatment of the plaintiff at that time? A. Yes, they are.

Q. And do you have, in your office or elsewhere, any other records that you have not produced here in court in connection with this case?

A. I have no other records.

Q. Will you kindly produce the hospital records that you have in court with you at this time so that they may be marked for identification?

Mr. Miller: Are you referring to records of 1951 or all records?

Mr. Doepker: All the records all the way through, we are starting at this time with the 1951 records.

Mr. Miller: All right.

Q. Doctor, you have produced here in connection with your examination, an envelope upon which has been marked Hospital No. 51-254 and the patient's name as Mrs. Lee Summers and the date of admission, March 15, '51 and the date of discharge, March 18, '51 and the name of the physician, H. E. Bone-

(Deposition of Hubert E. Bonebrake, M.D.)

brake, that envelope containing a series of hospital sheets entitled personal history, Doctor's orders, nurse's record, graphic chart, laboratory records, nurses records, anesthetic report; for the purpose of having these identified we will ask that the reporter now mark the envelope and the contents with a significant mark such [8] as D-1, and as to the pages, separate pages of the record, some identification such as 1-A.

(Plaintiff's Exhibit D-1, D-1A, D-1B, D-1C, D-1D, D-1E, D-1F, D-1G, D-1H, D-1I, D-1J, hospital records under hospital No. 51-254, marked for identification by reporter.)

Q. Now, again calling your attention, Doctor, to the envelope and contents which has been identified as Plaintiff's Exhibit D-1 for the purpose of identification, will you please examine the contents of the envelope and the various pages that have been indicated by the letters A to J inclusive, please, and state what those are?

A. D-1A is personal history record of Mrs. Lee Summers taken on March 15, 1951.

Q. All right, Doctor, in connection with that you have her listed here as Mrs. Lee Summers. Do you know whether or not she is the same person as Elsie Summers or the lady at least that is in the courtroom? A. This is the same individual.

Q. You were starting to identify the various pages of the record.

A. D-1B is Doctor's order sheets during her hospital stay; D-1C is a page of nurse's notes; D-1D is

(Deposition of Hubert E. Bonebrake, M.D.)

a laboratory record; D-1E is a graphic chart of temperature, pulse and respiration; D-1F is pathologist's report; D-1G is another page of nurse's notes; D-1H is a page of nurse's notes; D-1I is an anesthetic [9] report for March 16; D-1J is an anesthetic report for March 17.

Q. Were each and all of those records kept of your patient, Mrs. Lee Summers or Elsie Summers in the Wallace Hospital at the date that they purport to be, that is, to wit, the 15th of March, 1951 until the 18th of March, inclusive, 1951?

A. I don't understand your question.

(Question read by reporter.)

A. To my knowledge they were kept in the hospital all that time.

Q. She was your patient, is that right, all that time? A. Yes.

Q. And you were in charge of her case, is that right? A. Yes.

Q. And in the usual practice and course of business of the hospital these records were kept, isn't that true, Doctor, these were kept in the usual course of business of the hospital?

A. What do you mean by kept?

Q. You have them here?

A. You mean records were made at that time?

Q. Yes. A. Yes.

Q. Made and kept at the time they show on their face that they were kept, isn't that right?

A. Yes.

Q. And as far as you were able to tell they were

(Deposition of Hubert E. Bonebrake, M.D.)

correctly [10] kept, were they not, the records were kept correctly?

A. They were kept correctly, yes.

Q. We will offer then Plaintiff's D-1 and contents thereof in evidence.

Mr. Miller: My understanding of the rule is the offer is made now but admitted at the time of trial.

Q. What other records do you have of the hospitalization in March of 1951, Doctor, please?

A. Here is the record for Mrs. Lee Summers for March 25 through April 2, 1951.

Q. That likewise is kept in an envelope with the number 51-254, is that correct?

A. No, that is not correct, it is not the same number.

Q. I am sorry, it is a different number, 51-294.

A. Yes.

Q. The previous one being 51-254. Will you please examine the various sheets, Doctor, and state whether or not they are part of this record in Hospital No. 51-294, first for the purpose of identification, I don't want you to say what they are at this time. May the record show that we now ask to have the envelope and contents marked in the same manner as the previous envelope and contents were marked by the reporter.

(Plaintiff's D-2, D-2A, D-2B, D-2C, D-2D, D-2E, D-2F, D-2G, D-2H, D-2I, D-2J, D-2K, D-2L, D-2M, D-2N, D-2O, D-2P, envelope and contents, Hospital No. 51-294, marked for identification by [11] reporter.)

(Deposition of Hubert E. Bonebrake, M.D.)

Q. Now, then, Dr. Bonebrake, please, directing your attention to Plaintiff's Exhibit D-2 for identification and the sheets of records and so on contained in the envelope, will you please examine each and every one of those sheets and state, please, what they are?

A. D-2A is Doctor's orders during her stay at the hospital; D-2B is continuation of Doctor's orders; D-2C is a graphic chart of her temperature, pulse and respiration; D-2D is continuation of this record; D-2E is the pathologist's record; D-2F is the anesthetic report; D-2G is the personal history record; D-2H is the laboratory record; D-2I is a page of nurse's notes; D-2J, another page of nurse's notes; D-2K, page of nurse's notes; D-2L, a page of nurse's notes; D-2M, page of nurse's notes; D-2N, a page of nurse's notes; D-2O, page of nurse's notes and D-2P, a page of nurse's notes.

Q. Were these records, which you have just identified, Dr. Bonebrake, records that were kept of this patient in the Wallace Hospital at the time of the episode between the 25th of March, 1951 and the 2nd of April, 1951? A. Yes.

Q. And were those kept in the regular and usual course of the operation of the hospital?

A. Yes.

Q. And with you in charge of the patient that was involved at the time? [12] A. Yes.

Q. As far as you know they were correctly kept also?

A. As far as I know they were correctly kept.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. May we inquire then, please, Doctor, if you have further records of the patient, Elsie Summers, otherwise known as Mrs. Lee Summers, in connection with the Wallace Hospital and your treatment of her? A. I do.

Q. Do you have those with you there at the moment? A. Yes.

Q. May we see them, please? Just for the purpose of preliminary identification, will you please just casually look those over and see whether they are part of the hospital record, No. 52-410?

A. I am sorry, the number is 52-710.

Q. I attribute the error to my inability to read figures. Let the record show the plaintiff requests that the envelope and contents relating to Mrs. Lee Summers, being 52-710, and the envelope and inclusions be marked for identification as has been done previously with other exhibits.

(Plaintiff's Exhibit D-3, D-3A, D-3B, D-3C, D-3D, D-3E, D-3F, D-3G, D-3H, envelope No. 52-710 and contents, marked for identification by reporter.)

Q. Directing your attention, Doctor, to the Hospital No. 52-710 and inclusions, will you please examine the inclusions [13] and relate what they are, please?

A. D-3A is Mrs. Lee Summers personal history record; D-3B, Doctor's orders, D-3C is an itemization of her clothing and personal effects when she came to the hospital; D-3D is a page of nurse's notes; D-3E is a page of nurse's notes; D-3F is a

(Deposition of Hubert E. Bonebrake, M.D.)

graphic chart of temperature, pulse and respiration; D-3G is her laboratory record; D-3H is her X-ray report.

Q. And with respect to Plaintiff's Exhibit D-3 and the contents that you have related, are these records that were kept of this patient at the Wallace Hospital at the time that is indicated upon the various sheets that the records were made at the time indicated, 1952? A. That is correct.

Q. And were they likewise kept in the usual course of the operation and business of the hospital? A. They were.

Q. And correctly kept to your knowledge as far as you could know?

A. To my knowledge, yes.

Q. I don't know if we have previously indicated an offer, I want to be sure we did and likewise offer Plaintiff's Exhibit D-3. Do you have further records, Doctor, of Mrs. Lee Summers?

A. I do.

Q. Will you produce the rest, please? We will please ask the reporter to mark hospital envelope No. 54-901, Mrs. Lee [14] Summers (Elsie) and the contents the same as has been previously done with respect to the other three records.

(Plaintiff's Exhibit D-4, D-4A, D-4B, D-4C, D-4D, D-4E, D-4F, Hospital Envelope No. 54-901, marked for identification by reporter.)

Q. Directing your attention again, Doctor, please, to Plaintiff's Exhibit D-4 and the sheets

(Deposition of Hubert E. Bonebrake, M.D.)

that are enclosed, will you please examine them and relate to us what they are, please?

A. D-4A is personal history record of Mrs. Lee Summers during her stay in the hospital in November 29, 1954; D-4B is a Doctor's order sheet; D-4C is a graphic chart of her temperature, pulse and respiration; D-4D is laboratory record; D-4E is page of nurse's notes; D-4F is a page of nurse's notes.

Q. And as we have previously inquired, Doctor, does Plaintiff's Exhibit D-4 for identification contain a record that was kept of your patient, Mrs. Lee or Elsie Summers, in the Wallace Hospital under the dates that are shown upon the record?

A. That is correct.

Mr. Miller: I wish to interject an objection to the form of the question and particularly the words "your patient." I think the record speaks for itself and the person was a patient of Dr. Gnaedinger.

Q. What, if any, connection does Dr. Gnaedinger have with the Wallace Hospital at that time in 1954, Doctor?

A. In 1954 he was a member of the Wallace Hospital staff. [15] At about that time he was taken in as a partner. I am not sure he was a partner at that time or an employed individual. However, I could look up the record.

Q. Whether or not he was a partner, he was one of the physicians at the Wallace Hospital at that time?
A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. And at the present time is he available in Idaho, is he here? A. Yes, he is here.

Q. Here in Wallace? A. Yes.

Q. And still connected with the Wallace Hospital? A. Yes, he is.

Q. Are you familiar with this record in any way? A. I have looked it over.

Q. But at the time of this episode in the hospital, were these matters called to your attention?

A. I don't recall at the time they were ever called to my attention.

Q. Had there been any reason why Mrs. Summers, who had previously been your patient, should have been referred to another doctor at that time?

Mr. Miller: I am going to object to the form of the question.

Q. That you know of? [16]

Mr. Miller: Object to the form of the question as speculative and calling for the conclusion of the witness and not proper examination. You have to answer, Doctor, if you can.

A. She was not referred to another Doctor. We had a system at the hospital in which we always have one doctor available and she came in, I believe, at night and it was a night that Dr. Gnaedinger was on call, as we say.

Q. OK. A. So he took care of her.

Q. As to the contents of the record that is shown here you don't have any independent knowledge about this episode in the hospital, is that correct, you did not have at the time? A. No.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. When did you first become acquainted with the record, if at all, subsequent to these dates?

A. I knew she was in there and had talked to Dr. Gnaedinger at the time but that was the extent of my contact.

Q. We will, after the proper foundation and opportunity to call Dr. Gnaedinger, ask to have this record introduced in evidence also. Now, do you have further records? Will you make a brief examination of the contents of Hospital No. 56-141 just preliminary to identifying them. May the record show that we request, please, that the Hospital No. 56-141 and the contents be marked as has been previously done with the other Exhibits, D-1 through D-4 inclusive. [17]

(Plaintiff's Exhibit No. D-5, D-5A, D-5B, D-5C, D-5D, D-5E, D-5F, D-5G, D-5H, D-5I, Hospital record envelope No. 56-141 and contents, marked for identification by reporter.)

Q. Now, directing your attention to Hospital No. 56-141, Mrs. Arthur Lee Summers (Elsie) and contents of the envelope, will you please look them over and identify them, Doctor?

A. No. D-5A is personal history and physical examination record; D-5B is progress record; D-5C is the operation record; D-5D is the doctor's orders; D-5E is the laboratory record; D-5F is graphic chart of temperature, pulse and respiration; D-5G is page of Nurse's notes; D-5H is a page of nurse's notes; D-5I is a page of nurse's notes.

Q. The records enclosed in the envelope and the

(Deposition of Hubert E. Bonebrake, M.D.)

envelope are of Mrs. Elsie or Mrs. Lee Summers, your patient, are they kept in the usual course and practice at the Wallace Hospital upon the dates indicated? A. They were.

Q. And do they likewise correctly show the records that are depicted upon the various pages, they show the record of what is contained upon the various pages? A. They do.

Q. And they do so correctly, do they not?

A. To my knowledge.

Q. To the best of your knowledge. We will offer in evidence then Plaintiff's D-5. Do you have any further of those [18] type of records, Doctor?

A. No.

Q. What other records of the plaintiff do you have besides these?

A. We have our X-ray file.

Q. Is that available? A. Yes.

Q. May we have it please? Are a group of negatives that you have handed to counsel at this time negatives of X-rays taken in the Wallace Hospital of the plaintiff, Elsie Summers, over a period of time? A. They are.

Mr. Miller: Do you have any objection to marking those in date sequence?

A. They are all mixed up now.

(X-rays sorted by doctor.)

Q. May the record show that Dr. Bonebrake has now assembled a series of X-rays negatives in some order, chronological order I presume, which will

(Deposition of Hubert E. Bonebrake, M.D.)

permit the reporter to number the exhibits in sequence as they have been presented.

(Plaintiff's Exhibits D-6, D-7, D-8, D-9, D-10, D-11, D-12, D-13, D-14, D-15, D-16, D-17, D-18, D-19, D-20 marked for identification by reporter, X-rays.)

Q. Dr. Bonebrake, calling your attention to an X-ray negative that has been marked by the reporter during the brief [19] recess as Plaintiff's proposed Exhibit D-6 as of August 1, '52. Will you examine it, please, and state what it is?

A. This is an X-ray of Mrs. Lee Summers' abdomen taken August 1, 1952.

Q. What identification does the X-ray have on its face, Doctor, please?

A. There is a small X-ray plate which gives her name and the date, my initial and the X-ray number in the upper left hand corner.

Q. Then I assume that also upon the negative appears a letter, capital "R," is that right?

A. That's right.

Q. What does that indicate?

A. That indicates that is the right side of her abdomen.

Q. That would indicate the X-ray picture, or whatever you term it, was taken with the patient in what position? What position would she be, can you tell from the plate itself?

A. It is difficult to tell from the plate itself but I am quite sure it was taken either with her lying on her back or abdomen.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. But as to whether or not it would be one or the other you are not in position to state?

A. I am not in position to state but I believe the usual practice the picture would be taken lying on the back.

Q. Then the X-ray was taken by you or under your supervision [20] or how?

A. Taken by the technician at the hospital.

Q. I see and the apparatus that was used to take the picture was what type?

A. Mattern X-ray machine.

Q. Is that an X-ray machine that is approved by the medical profession, at least in the vicinity of Wallace, Idaho, as being an X-ray machine that would correctly depict the objects to which the photographic apparatus was directed? A. It is.

Q. What was the moving factor which caused the taking of this X-ray plate, Doctor?

A. Abdominal pain.

Q. Have you examined this X-ray in a shadow box so that you could tell what, if anything, was shown in it in the nature of pathology?

A. I have.

Q. Did you find anything, did you see anything in it?

A. Nothing except some dilated loops of gas in the bowel.

Q. And at the time this was taken by the technician, did you go into consultation with the technician concerning it?

(Deposition of Hubert E. Bonebrake, M.D.)

A. I don't recall I went into consultation about it.

Q. Did he furnish you a report after taking the X-ray? A. No, he didn't.

Q. At least you don't have any report from the technician [21] himself?

A. Not from the technician.

Q. Do you have a report separate on this X-ray? A. I do.

Q. That is in the file?

A. It is already there.

Q. The field of the X-ray is from the ribs down along the spine to and including the pelvis, is that right? A. Yes.

Q. Were there any other X-rays taken on this occasion at the time, the 1st of August, 1952?

A. No.

Q. Calling your attention to Plaintiff's proposed Exhibit D-7, what, if anything, does this X-ray show?

A. D-7 is an X-ray of Mrs. Lee Summers gall bladder taken January 6, 1953.

Q. And is it likewise identified by an identification that appears in the film itself?

A. It is.

Q. Showing the name of the patient and the date, is that correct? A. It is.

Q. This exhibit was taken with an identical type of machine, was it?

A. It was taken with the same machine. [22]

Q. Would you say both exhibits we have re-

(Deposition of Hubert E. Bonebrake, M.D.)

ferred to thus far correctly depict what they are purported to be directed at as far as X-ray technique is concerned? A. They do.

Q. Did you find any pathology in this X-ray?

A. No, I did not.

Q. Directing your attention to Plaintiff's proposed Exhibit D-8, will you state what that is, Doctor, please?

A. That is another gall bladder X-ray taken on January 6, 1953 of Mrs. Lee Summers.

Q. Did you find anything in the nature of pathology in that film, Doctor?

A. No, I didn't.

Q. Directing your attention to Plaintiff's proposed Exhibit D-9, will you state, please, what that is?

A. This is another gall bladder X-ray of Mrs. Lee Summers Taken January 6, 1953.

Q. And with respect to that—or might I ask a general question. Were all these X-ray negatives taken by the X-ray machine you have previously named and described? A. They were.

Q. Did you find anything in the nature of pathology in this X-ray? A. I did not.

Q. Calling your attention to Plaintiff's proposed Exhibit [23] D-10, will you examine it, please, and state what it is?

A. This is an X-ray of Mrs. Lee Summers' hand taken June 9, 1953.

Q. You have already answered they were taken

(Deposition of Hubert E. Bonebrake, M.D.)

on the same machine. Did you find any pathology in this? A. I did.

Q. What was it?

A. A comminuted fracture of the second phalanx of the left ring finger.

Q. Is that indicated on the film, sir?

A. It is.

Q. Directing your attention to Plaintiff's Exhibit D-11, will you examine it, please, and state what it is?

A. This is an X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. This X-ray is taken lower down than that of X-ray Exhibit D-6, is it not? A. Yes.

Q. It shows the hip articulation with the pelvis?

A. It does.

Q. And in the vicinity of that area between the two hip bones, do you find something in the X-ray there, Doctor, some metallic substance?

A. The X-ray shows the shadow of what appears to be a surgical needle. [24]

Q. Will you describe or tell us in what area this surgical needle appears to be, if you can, from the X-ray.

A. I cannot tell you from this one X-ray.

Q. Do you know whether this X-ray has been marked as to right and left or not?

A. I don't see any marking identifying right and left.

Q. Now, directing your attention to Plaintiff's

(Deposition of Hubert E. Bonebrake, M.D.)
proposed Exhibit D-12, will you examine it, please,
and state what it is?

A. This is a lateral X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. By a lateral it would be from side to side?

A. That's right.

Q. As to which side it was taken, you couldn't tell. Do you find any evidence of this object that you have described as possibly a surgical needle in this X-ray? A. I do.

Q. Where do you find it, Doctor?

A. It is lying anterior and superior to the symphysis pubis.

Q. And by that you mean it is in front and above, is that what you mean by anterior and superior or what? A. Correct.

Q. Calling your attention to Plaintiff's proposed Exhibit D-13 I will ask you to examine it, please, and state what that is, Doctor? [25]

A. This is another X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. Would be a period of approximately two weeks subsequent to the others?

A. The same day.

Q. Oh, the same day. What, if anything—you still find something of an unusual nature in that X-ray?

A. The same foreign body is seen lateral to the mid line on the right side.

Q. And that line is indicated upon the X-ray plate, is it not, by the capital letter "R"?

(Deposition of Hubert E. Bonebrake, M.D.)

A. It is.

Q. Then calling your attention to Plaintiff's Exhibit D-14 of the same date, will you state what that is, please, Doctor?

A. This is a lateral X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. Does it disclose anything of an unusual nature?

A. It discloses a foreign body one and a half inches anterior to the symphysis pubis.

Q. With respect to the other diagnostic or X-rays that were taken for the purpose of discovery, is it in the same relative position in all the X-rays? I mean, does it appear to be in the same relative position, has it changed in any way?

A. This X-ray is upright lateral taken with the patient [26] standing and it has changed a little bit, it has dropped down.

Q. And the right is also shown on this film, is it not? The right is also indicated on this film?

A. There is an "R" on the film indicating the right side of the patient was to the X-ray plate.

Q. Calling your attention to Plaintiff's Exhibit D-15, what, if anything, does that X-ray disclose, on what part of the patient's body is that taken of?

A. This is another lateral X-ray of Mrs. Lee Summers' pelvis.

Q. Taken the same day?

A. Taken February 20, 1956.

Q. Does it also disclose a foreign body somewhere in the film? A. It does.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. And what relative position is shown there?

A. This shows the foreign body to be anterior to the symphysis pubis and superior.

Q. I am unable to identify, is this a shift?

A. This is not a shift, it is the femurs superimposed one upon the other.

Q. Calling your attention to Plaintiff's Exhibit D-16, will you examine it, please, and indicate what that is?

A. This is another X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956. [27]

Q. Does it likewise show a foreign body in a relative position similar to the others?

A. It does.

Q. Now, calling your attention to Plaintiff's Exhibit D-17, what, if anything, is this X-ray taken of, Doctor?

A. This is a lateral X-ray of Mrs. Lee Summers' anterior pelvis, all not shown on here, taken February 23, 1956.

Q. Does that show any, is there any evidence of a foreign body shown in that X-ray?

A. There is.

Q. And in the same relative position or approximately relative position as the others or having moved?

A. It is in approximately the same relative position as the others.

Q. Calling your attention to Plaintiff's Exhibit D-18, I will ask you to examine it, please, and state what it is?

(Deposition of Hubert E. Bonebrake, M.D.)

A. This is another X-ray of Mrs. Lee Summers' pelvis, a lateral view taken February 23, 1956. This is an anterior pelvis.

Q. Does it show any metallic substance at all in it, or what is this? I am indicating a hook like substance?

A. It shows, besides the previously described foreign body, a catheter which has been placed in her bladder and also two steel needles which have been placed in the area of the foreign body.

Q. Was this taken during the course of some operative [28] procedure?

A. Preliminary to.

Q. Calling your attention to Plaintiff's Exhibit D-19, what, if anything, is shown in that exhibit?

A. This is anterior-posterior X-ray of Mrs. Lee Summers' pelvis taken February 23, 1956.

Q. And is that taken also preliminary to operative procedure? A. It was.

Q. Showing the catheter and some other substance there in connection with the foreign body?

A. It does.

Q. I observe, apparently, a sac of some kind?

A. Those are the bases of two long needles which were placed in this area to identify the object.

Q. To identify the object and its position or just identify the object?

A. Identify the object and position.

Q. Directing your attention now finally to Plaintiff's proposed Exhibit D-20, what, if any-

(Deposition of Hubert E. Bonebrake, M.D.)

thing, is disclosed in that exhibit or on it, sir?

A. It is another anterior-posterior X-ray of Mrs. Lee Summers' pelvis taken February 23, 1956.

Q. Likewise having some object directed toward the foreign body? [29] A. Yes.

Q. Now, do you have any further X-rays subsequent to this date? A. No.

Q. May I inquire, please, now, Doctor, do these exhibits that have been presented here by you contain a complete record so far as the Wallace Hospital and yourself are concerned respecting the patient, Elsie Summers or Mrs. Lee Summers?

A. No.

Q. Do you have some other records, something else besides what we have here? A. I do.

Q. Do you have those with you A. Yes.

Q. You have some further records?

A. I do.

Q. May we have them? You have now handed counsel a series of cards upon which there appears writing, generally, will you state what these cards represent?

A. Those cards are the clinical office record of Lee Summers, Mrs. Lee Summers and their family.

Q. And with respect to the various cards that are involved, which ones are related to Mrs. or Elsie Summers? A. All of them.

Q. All of them. [30]

(Plaintiff's Exhibits D-21, D-22, D-23, clinic cards, marked for identification by reporter.)

Q. Directing your attention now, Doctor, to one

(Deposition of Hubert E. Bonebrake, M.D.)

of the cards which you have presented, being Plaintiff's proposed Exhibit D-21, for the purposes of identification, what does that represent, please, Doctor?

A. D-21 is a clinic record representing the office calls of Mr. Lee Summers, Mrs. Lee Summers and their children from 1947 through March, 1951.

Q. Are these cards kept in the office records of the hospital?

A. They are kept in the office records of the clinic part of the hospital.

Q. The clinic part of the hospital, I see, and kept, I presume, by somebody that has charge of keeping the records, the clinic records?

A. Yes.

Q. Is that true of Plaintiff's Exhibit D-22 and Plaintiff's Exhibit D-23? You may examine them.

A. Yes.

Q. Now, with respect to this, is that some separate or different record?

A. This is a record of a special examination Dr. Hunter made of Mrs. Lee Summers.

(Plaintiff's Exhibit D-24, clinic record, marked for identification [31] by reporter.)

Q. And now the four cards, as you have testified, relate to the Summers family including the plaintiff, Elsie Summers, is that right?

A. Yes.

Q. As kept in the clinic, the clinic portion of the hospital, the office? A. Yes.

Q. Were these, any of these used by you in your

(Deposition of Hubert E. Bonebrake, M.D.)

treatment or diagnosis of Elsie Summers, were these cards used by you? A. They are.

Q. In your diagnosis and treatment of her during the time she has been your patient?

A. Yes.

Q. Now then, Doctor, do we have a complete record of the records of Wallace Hospital with respect to the plaintiff, Elsie Summers?

A. Yes.

Q. Going back to the inception of your contact or treatment of her in March of 1951, what was the occasion of you being called to attend her at that time?

A. She came to see me complaining of abdominal pain, low back pain and continuous bloody vaginal discharge, her last period having been February 8, 1951.

Q. In connection with this reason for her coming to see [32] you, did you obtain a history from her other than what you have now related?

A. Yes.

Q. After having obtained that history was there indicated to you further treatment by you or further examination by you at that time?

A. There was.

Q. And what, if anything, then did you do in connection with what you had learned up to this point?

A. She was advised, after examination, that she very likely had a tumor growing in her uterus. She was rather an obese individual, to find out for sure

(Deposition of Hubert E. Bonebrake, M.D.)

about this she was advised to be examined under an anesthetic which was done two days later.

Q. Then you made a physical examination of the part which you believed to be affected at the time, is that correct? A. I did.

Q. Then after having done so, what, if anything, did you discover concerning this examination?

A. When examined under anesthetic she was found to have a nodule growing on the right side of her uterus approximately two to three centimeters in diameter. As I say, she is rather an obese individual and this examination is quite difficult under those circumstances. She was advised that this thing could be a benign tumor, it could be malignant tumor or cancerous tumor or it possibly could be a pregnancy in the wrong place. [33]

Q. And pregnancy in the wrong place, is that sometimes known as ectopic pregnancy?

A. That's right.

Q. So these preliminary examinations which you made laid the foundation for your making further treatment of the patient, did it not?

A. It did.

Q. And then did you proceed further with the treatment of Elsie Summers at that time?

A. After the examination under anesthetic she was again told that a scraping or curettement of the uterus should be made to find out whether there was pregnancy present, whether cancer or just a benign tumor. The report came back on that, "normal uterine tissue," you might say.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. So did that report indicate to you that at least so far as that examination had gone, there was no malignancy present?

A. Up to that point we could say as far as this shows, we can't definitely tell you you have malignancy but it did not rule it out.

Q. And as a matter of fact the malignancy, that is, possible malignancy was taken into consideration at that time, a possibility?

A. It was taken in consideration from the very onset.

Q. That is what I mean, up to this time, Doctor, the [34] examination you made. Then proceeding further with your examination and treatment of the patient, what was indicated by this, what needed to be done for the benefit of the patient?

A. After we got the reports back we knew we had a patient who was bleeding, who had a mass growing in her uterus. We felt currettement had pretty well ruled out pregnancy. Those tissues are examined by an expert at the University of Oregon Medical School. She still had a tumor. She was advised this should be removed.

Q. In furtherance of that advice, did Mrs. Summers arrange to have the tumor removed, or have whatever surgery was necessary or indicated at the time? A. She did.

Q. And did she leave the method of operation or what was necessary to be done up to you as her physician at that time? A. She did.

Q. And then in furtherance of this examination

(Deposition of Hubert E. Bonebrake, M.D.)
and diagnosis at the time, did you perform surgery finally upon Elsie Summers? A. I did.

Q. Will you relate, please, what was done in connection with this surgery in some detail, please, Doctor?

A. Under general anesthetic through midline abdominal suprapubic incision, this is an incision between the pubic area and navel, her abdomen was explored; her uterus was found to be [35] about twice normal size, and, in the right upper part of the uterus where the Fallopian tube comes in, there was a mass two or three centimeters in diameter. The uterus and both tubes appeared scarred. The uterus in its entirety, that includes what we call the cervix or mouth of the womb, was removed. The appendix was also removed. That is common procedure if the appendix is lying there, we take it out.

Q. And that is if it appears to be indicated by examination you remove it?

A. We remove it very frequently.

Q. Is there anything about that particular portion of the operation that makes it any more difficult from a physician's standpoint, that is, removal of the appendix in that fashion?

A. Not ordinarily.

Q. It is just another portion of the patient's anatomy that was indicated to you as her doctor should be removed and was removed, is that right?

A. That's right.

Q. In the process of this surgery? What else was done in the way of any surgical procedure?

(Deposition of Hubert E. Bonebrake, M.D.)

A. A repair of her vaginal wall was done. This we call a perineorrhaphy.

Q. This you have related, does that generally take care of the operative procedure that was performed at this time in March of 1951? Is that a pretty complete relation of what was [36] done at that time? A. Yes.

Q. In a general way. Now, after these portions of the patient's, that is, plaintiff's anatomy were surgically removed, what was necessary to be done with the suturing or closing up the incisions that have been made. What was necessary to do then?

A. I don't understand your question.

Q. Making it more direct, was it necessary to sew, in common parlance, to sew up the parts, what was left after the remaining parts had been removed?

A. After the uterus and tubes and appendix were removed, part of that procedure is to sew up all blood vessels which might bleed, close off ligaments which hold the uterus in place and sew up the top of the vagina to other tissue in the pelvis and cover it over with peritoneum which is the lining of the abdomen. After that the wound is closed and this is closed in three layers. First the peritoneum or lining of the abdomen is closed, then the tough, fibrous, what we call fascia is closed and then the skin.

Q. That is relating the closure from the interior portion outward, is it not, out to the surface of the skin? A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. Now in that procedure, was this operation performed in a single operative procedure or was it done in sections at [37] different times? Was it all done at the same operative procedure or same surgery?

A. It was all done under the same anesthetic. There were two surgical setups required, one for vaginal work, one for abdominal work.

Q. Did that require another opening of the abdominal wall or the pubic wall to perform that other operation or was it done with the one opening?

A. The hysterectomy was done with one opening in the abdomen; the vaginal repair was done from below with an incision at the mouth of the vagina.

Q. Now, in this procedure that was followed at that time, did you employ any surgical needles?

A. I did.

Q. And in this particular case, the sewing that was done, using common parlance, was done with one or more types of surgical needles?

A. More types of surgical needles?

Q. More than one type? A. Yes.

Q. And what portion or what parts of this operative procedure required the use of a hook type surgical needle such as may have been indicated in the X-ray that we examined earlier in the morning?

A. That is a curving needle. All of the operation, in all the operation a curved needle is employed, the only place a straight needle is used is in closure of the skin. [38]

(Deposition of Hubert E. Bonebrake, M.D.)

Q. That is outside? A. Yes.

Q. And did you, in connection with the plaintiff, Elsie Summers, employ curved needles in the course of this operation? A. I did.

Q. In the, we will say, careful practice of operations, who do you have in charge of the needles so you know how many needles are being used in an operation? A. Our surgical nurse.

Q. And in this particular case were those needles counted at the start of the operation?

A. They are counted at the start of the operation.

Q. Were they in this particular case?

A. I am sure they were.

Q. And, of course, your attention was directed to the physician's or surgeon's part of the job, is that right? A. Yes.

Q. When the operation is completed, in this case was the number of needles that had been used checked?

A. When the peritoneum was closed the needles were checked.

Q. The peritoneum? A. The Peritoneum.

Q. Peritoneum, is that the second layer or first layer? A. First layer.

Q. The inside of the pubic area out, is that correct? [39] A. Correct.

Q. And after that work is done then, are you through with the curving needle or do you still have further use of a curved needle?

(Deposition of Hubert E. Bonebrake, M.D.)

A. There is one more layer to sew with curved needles.

Q. And that is the layer you have described previously as the ones that were being sutured and closed up, is that correct? A. Yes.

Q. Is that particular layer, that particular part of the abdominal wall, was that inside of the abdominal cavity or is it laid in the layer of the abdomen itself, the closure of the entire wall of the abdomen?

A. In the wall of the abdomen, not on the inside of the abdomen.

Q. Not on the inside. A. No.

Q. Whatever surgical procedure you had followed came from the inside of the abdomen or inside of the area where the vagina and fallopian tubes lay out to the outside?

A. I don't understand your question.

Q. I don't know whether I asked you that right or not but what I had in mind was the only part of this surgery performed on plaintiff consisted of going on inside of the abdominal wall to the area where the uterus and fallopian tubes were and suturing the inside of the abdomen first and then peritoneum [40] and the middle wall and the outer skin, is that correct? A. Correct.

Q. Those needles that were being employed, of course you, as a surgeon, knew it was important, did you not, to know they were all, each had been removed after having been used or accounted for on the operating table? A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. Was that done in this case?

A. That was done after the peritoneum was closed.

Q. You didn't make separate counts of needles, that is, count when you went into the inside of the abdomen, count needles, and again when the peritoneum layer was closed count them again?

A. They were counted when the peritoneum was closed.

Q. And they were counted before the operation was started, were they not?

A. I am sure they were.

Q. So in careful checkup on the number of needles that were used to start with and the number of needles that were there at the finish, they should all be accounted for, all the needles be accounted for?

A. Yes.

Q. And at a subsequent time you did, however, discover there was one needle that had not been accounted for, did you not? One surgical needle that had not been accounted for that [41] had been left in the body of the plaintiff here?

A. Not at the time of the surgery.

Mr. Miller: I will object to the form of the question as being a double question, you asked two questions. I think he should have the opportunity to answer whether there was or was not a lost needle and then when he discovered there was a lost needle.

Q. Asking one question at a time, you assumed, during the course of this operative procedure that all needles had been accounted for that had been

(Deposition of Hubert E. Bonebrake, M.D.)

used by you or by your assistant in this operation?

A. After the peritoneum was closed?

Q. Yes.

A. Up to the time the peritoneum was closed they are accounted for, between the time that is closed and the skin is closed, yes, we assume they are accounted for.

Q. It isn't common practice, is it, to leave to chance the presence of an operative needle or surgical needle before the peritoneum wall is closed? It isn't common practice just to take a chance and not know all needles have been accounted for?

A. No, it is not common practice.

Q. After the peritoneum is closed, as far as you were concerned, wouldn't you say it was just as important to see the needle that had been used in the operation had been accounted [42] for throughout?

A. We will say from the primary area of the operation, closing the abdominal wall, accounting for needles after that, yes, is important. However, we are outside of the abdomen at that time, that is when the sponge count is made, when the peritoneum is closed.

Q. And in regular, proper or approved methods of procedure the count of the needles is made and you know in no portion of the abdomen there isn't a surgical needle left, there shouldn't be one left in proper procedure? A. No.

Q. You say no or do you agree?

A. I agree a needle should not be left.

Q. Then coming along during this period of

(Deposition of Hubert E. Bonebrake, M.D.)

time subsequent to March of 1951, did you have occasion to perform any other operative procedure in the area of the uterus or fallopian tubes or abdominal wall of the plaintiff subsequent to '51?

A. Yes.

Q. When was that? A. 1956.

Q. I mean between 1951 and 1956?

A. No.

Q. There wasn't any other surgical procedure performed, at least by you, was there?

A. No. [43]

Q. And in 1956 you didn't find any evidences of any other surgery except the one from 1951, is that correct? A. That's right.

(Recessed 12:08, reconvened 1:30.)

Q. Resuming after a noon recess, Doctor, we were discussing, I believe, the method of sealing up the wounds there at the time of the original operation and I would like to inquire further about, at the time, Doctor, the close of the operation, what assistance, if any, you had in the way of medical, professional men in the operation itself?

A. Dr. Paul M. Ellis.

Q. Dr. Ellis was assisting you, was he, with the operation? A. Yes.

Q. In what specific particular?

A. He was my first assistant for that operation; two of us always operate on major surgery.

Q. And whenever it would be the course of practice of the first assistant was being taken care of by Dr. Ellis at that time? A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. And you also had the surgical nurse?

A. Yes.

Q. Who had charge of the sponges and surgical needles, among other things? A. Yes. [44]

Q. What was the approximate period of time this operation took from start to finish, if you recall?

A. It would be on the record, two hours.

Q. During which time Elsie Summers was, of course, under anesthetic? A. Yes.

Q. Do you know what type?

A. There again that would be on the record.

Q. Whatever the record shows would be what was used. Now then later, after the operation was completed, she remained in the hospital for a period of time and then was discharged, is that right?

A. Yes.

Q. Later and following this operation, I presume Mrs. Summers was in contact with you professionally, was she, in connection with the progress of the case after the operation?

A. She was in the office two or three times after the operation.

Q. She made calls to the office at the hospital, is that correct? A. Yes.

Q. Naturally, I presume, you were interested in the development of the case and as to whether or not she was recovering? A. Yes.

Q. Isn't it your recollection, Doctor, that she, however, [45] was doing a considerable amount of

(Deposition of Hubert E. Bonebrake, M.D.)

complaining about pain in the abdomen and back following this operation?

A. She complained of back pain.

Q. Back pain primarily? A. Yes.

Q. Did you relate that to the operation itself or to any other possibility?

A. I didn't relate it to the operation. In fact, she had back pain before the operation.

Q. It was just one of the circumstances that were present in the case, is that right? That back pain was one of the circumstances that was present in the case?

A. It was something she had complained of.

Q. Yes. However, Doctor, the following summer you did conduct further examination of her, didn't you, Doctor, the next year, in '52?

A. In 1952 she was hospitalized for two to three days, according to the records here, for an abdominal pain.

Q. I was noticing a portion of the hospital records, that is the bedside notes particularly, I think it is maybe sheet No. 1 of bedside notes, at least the record says that she was admitted ambulatory through the emergency room and there was severe abdominal pain that relates to the lower back?

Mr. Miller: Just a second. I am going to object to the question unless the witness is handed records to which counsel [46] refers, which, I presume, is the record here?

A. Yes. I think the Doctor may have reviewed them recently, I can get them if necessary. We

(Deposition of Hubert E. Bonebrake, M.D.)

will notice from the original record, apparently taken from the personal history, and I was inquiring about this first complaint that was made and also these matters that are listed here in the course of these records which are somewhat confusing because of not having the same heading, but at least you can refer to the chief complaints that are mentioned there. I am going to use this, use the copy that was furnished us because that is what we have to go by and the reference here, you will notice it is referred to as bedside notes on their copy. At any rate, that is not too material. The thing is which is related here, "admitted ambulatory through emergency room" and also mentioned a specimen of urine obtained and severe abdominal pain that radiates to the lower back and then it refers to what was given her, demeral and so on. There is another there that we are not familiar with the name of, streptomagna, is that true?

A. That is a medication.

Q. And at this time in the following year she was admitted to the hospital concerning this back pain, wasn't she, and abdominal pain?

A. Mostly abdominal pain as I recall at that time.

Q. OK. The only thing I was trying to do was to question you concerning the records which admittedly, of course, are here. [47] And again the following year in 1953 we have, we don't have a hospital record but we do have a series of X-rays that were taken of the plaintiff, Elsie Summers,

(Deposition of Hubert E. Bonebrake, M.D.)

in which a gall bladder examination was made, isn't that right? A. Yes.

Q. And gall bladder pain is reflected normally where? Where would it say "hello" to the person that had it, on the body?

A. Pain in the upper abdomen and pain through to the upper back.

Q. And in 1953 there was a number of X-rays taken with relation to attempting to diagnose a gall bladder situation? A. That's right.

Q. It is also true you had connection with her complaining of pain in the abdomen and back at that time, didn't you? A. Yes.

Q. And then going on to the time when the X-rays were taken in 1956, at that time you took a number of X-rays in connection with this foreign body that appeared in the X-rays and you took X-rays from various positions, did you not?

A. Yes.

Q. And also with relation to the body itself, lower down in the pubic region than you had taken them previously, is that correct?

A. Yes, that's correct. [48]

Q. Now, after having taken and having these X-rays to aid you in locating this foreign substance, did you then proceed to remove the foreign object?

A. Yes, and after consultation with the patient I removed it, yes.

Q. Then I wonder if you will please relate what procedure you took to do that? What was done and how did you go about it?

(Deposition of Hubert E. Bonebrake, M.D.)

A. She came to me in 1956, with this story that she had a needle and I took a series of X-rays at various angles, anterior - posterior, lateral views, X-rays taken with her standing and with her lying down to help me locate this needle. On reviewing the X-rays it was our opinion this needle was not in her abdomen, it was in the abdominal wall. She was advised in our opinion this needle had absolutely nothing to do with the pain she was complaining of but if she wanted this needle removed, we would take it out. She wanted it removed so we did take it out. She was taken to the X-ray room and under local anesthesia, to aid us in actually pin-pointing this foreign body, straight needles were placed through the skin in this area, and with the aid of the fluoroscope and X-ray pictures, these needles were inserted until the points of them were directly over the foreign body. We knew then exactly where to make our incision to most easily remove this foreign body. She was then taken to surgery with the needles still in place, anesthetized and an incision was made lateral to the original incision. We felt the easiest approach was to make another incision rather than to try to go through the old scar. [49] The object which was a steel needle was found readily and removed. It was a broken needle, not a full needle. The eye was broken off. The other part of the needle was not in the wound, only one piece.

Q. Then the other part of the needle wasn't discovered? A. Was not in the wound.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. Was it located at all in the course of the examination, the eye part of it? A. No.

Q. Never had been as far as you know until now, never had been located as far as you know up until now? A. No, it has not.

Q. After you removed the surgical needle, Doctor, you gave it to her, didn't you?

A. Yes, a couple of days later she said "Where is the needle?", I said "I have it, do you want it?" and she said "yes" so I gave it to her.

Q. And at that time you delivered this needle you found, delivered it to her? A. Yes.

Q. May I inquire specifically where did you find the needle at the time you removed it, where was it with respect to the body?

A. It was lying in the extra peritoneal space, which is outside [50] the peritoneum, between that layer and the layer of muscles in the abdominal wall.

Q. And in this particular case, referring to this particular case, as you remember, how thick is that peritoneal substance?

A. The peritoneum itself?

Q. Yes. A. 1/32" to 1/16".

Q. It is comparatively thin layer of membrane, is it not? A. Yes.

Q. In your removal and searching and finding this surgical needle, did you find any evidence of scar tissue adjacent to it? I mean by that did it appear to have moved from one place to another?

A. No.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. What was the situation with respect to the surrounding flesh of the needle itself?

A. It was perfectly normal. There was no scar tissue about the needle, no septic flesh. It was lying there in a pad of fat.

Q. What I was inquiring about, is there a possibility this needle could be moving during this period of time between '51 and '56 in the patient's body? Could it be moved from the inside out, along or lateral, or in the position it was found, could it previously have been somewhere else? [51]

A. In my opinion, absolutely no.

Q. Is it your opinion it was in the same place during this period of time from the plaintiff's operation, is that true? A. That's true.

Q. With respect to the outside layers now, coming from the needle outside in the abdominal wall, what would be the thickness there approximately of the outside layers? That heavy muscular tissue and fatty substance, if any, and the skin itself?

A. In this individual I would judge the distance from the skin to where the needle lay was 2 inches to 2 and a half inches.

Q. That would be the thickness of the abdominal wall outside the peritoneal wall, is that true?

A. That's right.

Q. Then after this procedure was had and the needle turned over to the plaintiff, she was discharged in a period of three or four days, was she?

A. I think it was four to five days, it is on the record there.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. At any rate, after a local anesthetic was employed to locate the foreign body, you did perform surgical operation with general anesthetic, did you not? A. I did.

Q. In connection with the needle, having, being a broken needle, in the course of the operation do you recall having a [52] needle broken while you were using it?

A. I don't recall specifically. However, we know practically every time we operate a needle is broken sometime during the procedure, a very common thing to happen.

Q. There is nothing particularly unusual, there is nothing particularly unusual about having the head of a needle break out while you are suturing, is that right? A. That's right.

Q. There was another matter we wanted to relate to and that is the fact that we had named as defendant here Lewis B. Hunter and one of my original inquiries was his connection with the Wallace Hospital, you having explained that at the time this original operation took place he was a member of the partnership arrangement and then later left. Do you know when it was, approximately, that he left?

A. I think it was July, 1954.

Q. July '54, so that at the time this original complaint was served or filed, at least, and served upon you, Lewis B. Hunter no longer was a member of that partnership, is that right? This would

(Deposition of Hubert E. Bonebrake, M.D.)

be in '57 I imagine sometime, and he, at that time, was not a member of the partnership?

A. That is correct.

Q. We are trying to fix the time that he ceased to be for the record. I think that's all.

(Witness excused.)

/s/ HUBERT E. BONEBRAKE,
Deponent. [53]

[Endorsed]: Filed September 18, 1958.

[Title of District Court and Cause.]

DEPOSITION OF DR. R. W. CORDWELL

Be It Remembered, pursuant to stipulation of counsel, the deposition of Dr. R. W. Cordwell was taken in the District Courtroom of the Shoshone County Courthouse, Wallace, Idaho on the 26th day of August, 1958 at the hour of 2:54 P.M., M.S.T. Present at the taking of said deposition were the following: Elsie Summers, plaintiff, with her attorneys of record, Mr. James W. Ingalls and Mr. M. J. Doepker; Dr. R. W. Cordwell, deponent; Mr. E. L. Miller, attorney of record for the above named defendants; Merle Myers, Deputy Clerk of the First Judicial District of the State of Idaho, before whom said deposition was taken, and Irene Vermillion, Court Reporter, who took said deposition down in shorthand and later transcribed the same into typewriting.

Whereupon the following proceedings were had and done, to-wit: [1]*

DR. R. W. CORDWELL

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Doepker): Will you kindly state your name, please?

A. Robert William Cordwell.

Q. What, if any, profession are you engaged in?

A. Practice of medicine and surgery.

Q. And have been engaged in that profession in the Coeur d'Alene District, have you?

A. Yes.

Q. For how long a time?

A. Ten years and ten months.

Q. You have been duly licensed in the State of Idaho to practice your profession as surgeon and physician? A. Yes.

Q. In the course of such practice, Doctor, did you ever have occasion to have as your patient one Elsie Summers, the lady sitting here in the courtroom? A. Yes.

Q. You recognize her as the lady in question, do you? A. Yes.

Q. Where was that, Doctor, in what part of the Coeur d'Alene District? [2]

* Page numbers appearing at bottom of page of Original Deposition.

(Deposition of Dr. R. W. Cordwell.)

A. This was in Kellogg, Idaho at the Wardner Hospital.

Q. Are you connected with the Wardner Hospital or were you at that time?

A. Yes, and I still am.

Q. In connection with this patient-physician-surgeon relationship were there some hospital records kept of this episode? A. Yes.

Q. Did you bring those records with you into court today? A. Yes.

Q. Do you have them with you? A. Yes.

Q. Are you in a position to detail the details of all the examinations that were made at that time from memory without the aid of these records of the hospital? A. No.

Q. The hospital records would give you an exact record and the exact picture of the situation, isn't that correct?

A. Yes, particularly the dates.

Q. All right. Then may we examine them, Doctor? You have delivered to counsel a series of pages of records including some card records and the card records bear the name of Mrs. Arthur (Elsie) Summers and also the page records bear the name or patient's name, Mrs. Elsie Summers. In each of those cases do they relate to the lady in the courtroom at the present time? [3]

A. Yes.

Q. I observe that there appear to be two different records here, is that correct?

A. That is correct, in fact, there are three dif-

(Deposition of Dr. R. W. Cordwell.)

ferent records. One is for our clinic, that is our office record, the other two are hospital records.

Q. Then we would like to number these in some sort of sequence, that is as to time and which would be the first of the two sets of records, Doctor?

A. This one.

Q. You have indicated a series of records bearing date August 5, 1955, is that right?

A. That is the first hospital record. The clinic record probably should be first because we usually make notes on that, when a person is admitted.

Q. Let's go back for the time being and mark this in sequence as an exhibit please?

(Plaintiff's Exhibit D-25, Clinic Card, marked for identification by reporter.)

Q. Calling your attention to a mark having been made by the reporter, Plaintiff's Exhibit D-25, that is for the purpose of identification, will you please state, Doctor, what that is?

A. That is my clinic record of Mrs. Elsie Summers.

Q. And is that a record that was kept in the usual course of business of the Wardner Hospital at Kellogg at that time? [4]

A. Wardner Hospital and Clinic.

Q. I see, Wardner Hospital and Clinic and this is the clinic?

A. Yes, this would be the record which a doctor would keep in his office.

Q. All right. At any rate the clinic record which is represented by Plaintiff's Exhibit D-25 contains

(Deposition of Dr. R. W. Cordwell.)

what? I mean, is it notations that you made or that were made under your supervision at the time?

A. Notations that I made and also that Dr. Scott made.

Q. Was Dr. Scott associated with you in the Wardner Clinic at the time?

A. Yes, he was my partner.

Q. As I understand it, this is the original record that was made in connection with Mrs. Elsie Summers? A. Yes.

Q. We want to offer this in evidence.

Mr. Miller: I would like to ask the witness one question.

Mr. Doepker: OK.

Mr. Miller: Over what period of time, the beginning date and ending date, does that record cover?

A. This starts 8/5/55, August 5, 1955 and ends on 8/30/55.

Mr. Miller: On 8/30/1955?

A. Yes.

Mr. Miller: Is that all the records you have which concern [5] patient, you haven't seen her at any time since that date?

A. That's correct, nor before.

Mr. Miller: Thank you.

Q. Then directing your attention to another series of documents, will you please generally state what those documents are?

A. This is a hospital record of Mrs. Elsie Sum-

(Deposition of Dr. R. W. Cordwell.)

mers during her admission to the Wardner Hospital, Kellogg, Idaho, starting 8/5/55.

Q. Going through to what date does it show on the record? A. 8/12/55.

(Plaintiff's Exhibit D-26, hospital records, marked for identification by reporter.) (D-26A thru D-26G.)

Q. And for the purposes of identifying individual items, Doctor, will you please go through there and state what they represent?

A. The first sheet is an Admission Blank which usually states a person's name, age, sex, date of birth, nearest relatives and so forth; second sheet is a charge sheet, record of hospital charges; third and fourth sheets are called clinical sheets, we keep a record of respiration, pulse, temperature, medications and sometimes nurses' notes; fifth sheet, this should be sheet D, Doctor's Orders sheet; Sheet E is Laboratory Record; F is the history and physical; and G is roentgen examination report, commonly known as X-rays but erroneously so. [6]

Q. Further identifying, Doctor, you have brought with you a series of reports which appear to bear the date of August 24, 1955?

A. Yes, sir.

(Plaintiff's Exhibit D-27, D-27A, D-27B, D-27C, D-27D, D-27E, D-27G, hospital records, marked for identification by reporter.)

Q. May I please inquire now, Doctor, whether each and all of these proposed Exhibits D-25, D-26

(Deposition of Dr. R. W. Cordwell.)

and D-27 were kept in the usual course of business of the Wardner Hospital and Clinic at Kellogg?

A. Yes.

Q. Bearing the dates that they purport to bear?

A. Yes.

Q. And kept correctly to the best of your knowledge in all detail? A. That is correct.

Q. Then subsequently or during the time that these episodes in the clinic and hospital, did you have occasion to take some X-rays, the term is X-ray negatives, of the plaintiff?

A. Yes, sir.

Q. May we see them please? You have presented to counsel two X-ray films and are these identifications upon them to connect them with the plaintiff, Elsie Summers?

A. Yes, sir, her name is on them, Mrs. Arthur Summers is [7] the name on there. I understand it is one and the same person.

Q. Should one of these be ahead of the other?

A. No, they were both taken the same day, I think they are different views.

(Plaintiff's Exhibits D-28 and D-29, X-rays, marked for identification by reporter.)

Q. Now, Doctor, please, as to Plaintiff's proposed exhibits D-28 and D-29, are these exhibits taken of the patient, Elsie Summers, the plaintiff in this case, on or about August 6, 1955?

A. Yes.

Q. And have been in your possession and are records of the clinic and hospital since that time?

(Deposition of Dr. R. W. Cordwell.)

A. Yes, sir.

Q. Do the negatives indicate which side is the right and left by some identification?

A. Yes, sir, there is an "R" on the right side.

Q. These were taken of the patient by what type of X-ray apparatus do you employ at the hospital?

A. We have two different ones, one is an old G.E. and one is a newer Westinghouse. I think these were taken by the Westinghouse. I did not take them.

Q. They were taken by some technician at the hospital?

A. Yes, registered technician.

Q. Under your direction as physician and surgeon?

A. Yes. [8]

Q. And do they, to your knowledge, correctly depict the portion of the anatomy to which they were directed?

A. Yes, sir.

Q. Now, Doctor, with whatever assistance you need of the records which we have presented, may we please inquire whether the plaintiff, Elsie Summers, upon the occasion of the original clinic record, came to you for the purpose of treatment?

A. Yes, sir.

Q. And did you then proceed to take a history from her?

A. Yes, sir.

Q. And do you remember or do the records there indicate what the history was that she gave you at the time?

A. My memory is much better if I have the records.

(Deposition of Dr. R. W. Cordwell.)

Q. You may use them.

Mr. Miller: Will you please tell me to which you are referring?

A. The one I have now is D-26 on 8/5/55, hospital record.

Q. We were asking you to relate what the history was given you by the prospective patient at the time?

A. All right. Her chief complaint was pain in the vagina, present illness, patient is a 41 year old married white woman, this is slightly paraphrased, who has had increasing pain in the vaginal region and lower abdomen for the past week. Now extremely painful to motion. In March, 1951 patient had hysterectomy, tubes and uterus removed, and appendectomy and perineorrhaphy by Dr. Bonebrake of Wallace, Idaho. [9] She has five living children, two miscarriages; patient states that in 1949 she had an attack similar to that at present. Examination, patient is a 41 year old moderately obese white woman with positive findings limited to abdomen and pelvis. There is generalized abdominal tenderness, most marked across lower abdomen with no rebound. Pelvic exam: outlet parous; patient complains of extreme tenderness of vagina, even at the outlet. No masses felt or seen; X-ray abdomen shows curved round surgical needle in pelvis to right side. Diagnosis, pelvic cellulitis, acute. Foreign body in pelvis.

Q. Is that the——

(Deposition of Dr. R. W. Cordwell.)

A. That is what I have done, I may have paraphrased a couple of things to make it more legible.

Q. At any rate, does that represent your history and also your findings that were made at the time?

A. That is correct. The X-ray was made the following day.

Q. But with reference to this particular exhibit, which I believe you stated is D-26, the rest of the exhibit consists of things you have mentioned, that is nurse's records and so on?

A. That's right, laboratory—

Q. Laboratory exam and so on. Now, referring to the film D-28 and D-29, are you able at this time to point out the foreign body that you referred to in your report?

A. Yes, sir, it is right here. [10]

Q. You are indicating with a pencil a curved object that in the film lies, what do we call this bone? I mean in the film?

A. It would be above the pelvic brim. You could see by this it probably would be anterior from the pelvis or toward the front, because this is the back part, this is the hole through which babies come.

Q. All right. And naturally you did see that object laid in anterior in the pelvis?

A. I think so, you can't tell for sure on flat film. This is the right side, you reversed this.

Q. It appears in both films is that right?

A. I took the second film to be sure it wasn't

(Deposition of Dr. R. W. Cordwell.)

artifact, something that looks like it was there only isn't.

Q. At any rate your examination was made on the date of her admission?

A. That was made the day after.

Q. And the next day after the X-ray films were obtained, you found you had evidence of a foreign body or surgical needle in the plaintiff's abdomen?

A. I found it within fifteen minutes after they were made. I looked at them wet. She came in at 9:00 p.m. and we got films the next morning.

Q. Did you also have a diagnosis of another condition besides the surgical needle?

A. Oh, yes, sir. [11]

Q. What did you call it?

A. I called it pelvic cellulitis.

Q. How do you spell cellulitis? C-e-l-l-u-l-i-t-i-s?

A. Exactly the way it is.

Q. Which means what?

A. To me it means generalized infection, inflammation.

Q. Then subsequently, I think we had one other, D-27, what was the occasion for this episode of the 24th of August?

A. Could I see the clinic record, please?

Q. You bet.

A. Dr. Scott admitted her for me at that time. According to his notation—is it all right to read his notation?

Q. That will be offered in evidence. I presume you and he were associated in the matter?

(Deposition of Dr. R. W. Cordwell.)

A. Yes, sir. He has "Pain in pelvis since release from hospital. Has had chills, much more severe past one to two days, admit for R.C." That means he admitted her for me.

Q. At that time did you make any further physical examination or what was the course of treatment?

A. History and physical were as before, very similar. I did, however, examine her under sodium pentothal, as I recall she was quite tender and it was quite difficult to get a good examination. And I made wet and dry smears of her vaginal secretions but I found nothing different.

Q. Were there any recommendations made by you at that [12] time concerning anything in the nature of removal of this foreign object or does your record show?

A. My record doesn't show that and I don't remember exactly.

Q. All right, Doctor. Doctor, from your examination of the patient and these X-rays and the finding of a foreign object in the pelvic region, would it be your recommendation to have this foreign object removed?

A. That would depend on whether I thought it was causing her difficulty or not.

Q. And from that would be based your recommendations, is that it, from that situation?

A. Yes, sir.

Q. But you do not have in the record any rec-

(Deposition of Dr. R. W. Cordwell.)

ord of a recommendation at all or any memory about it?

A. I can't remember whether I told her it should be removed or not but I don't have it in the record.

Mr. Doepker: You may inquire.

Cross Examination

Q. (By Mr. Miller): Referring to Exhibit 26 and 27, Doctor, for the purposes of this deposition, the records of the hospitalization of the plaintiff in this action, were there also nurse's notes taken?

A. Only what is in here. [13]

Q. No other nurse's notes?

A. No other nurse's notes.

Q. Fine. Now, Doctor, referring to Exhibits 28 and 29 for the deposition, what type of X-ray is this, what type view is it?

A. A-P, anterior, posterior. It was taken with her lying on her back on the table, shooting through with the film underneath.

Q. In other words, you have heretofore testified it is difficult to determine on flat film whether or not the needle would be located in the cavity or exterior of the cavity? A. That's correct.

Q. And at no time during your examination did you make a diagnosis that this needle was within the cavity itself?

A. Excuse me, what do you mean?

Q. Well, inside? A. Abdominal cavity?

Q. Yes.

(Deposition of Dr. R. W. Cordwell.)

A. No, I did not make that diagnosis.

Q. In other words, your diagnosis was there was a foreign body and its location was in the pelvic area and that was as far as the diagnosis could go with the X-rays taken?

A. That's right.

Q. Doctor, I am handing you what has been marked for identification as Exhibits D-12, D-14 and D-15 for the plaintiff in [14] this action and ask you to examine those X-rays and tell me what type view that these X-rays show?

Mr. Doepker: Just a moment, let the record show that plaintiff objects to the question on the ground and for the reason that it is improper cross examination because the matter was not gone into on direct examination of Dr. Cordwell.

A. You understand they are not on a view box and I usually look at X-rays on a view box. You mean these are all the same view?

Q. No. I asked you what type X-ray would they be, anterior-posterior or lateral view, sir?

A. None of these are anterior-posterior. This is a lateral, this is D-12, this is a lateral of the pelvis.

Q. Pelvic area?

A. Pelvic area and shows part of the lumbar spine.

Q. And the other two, Doctor?

A. This is D-15, this is also a lateral view, shows very slightly oblique and that would be lower down, shows the hip, shows left of the hip

(Deposition of Dr. R. W. Cordwell.)

joint, shows sacrum, cocci, upper part of the sacrum and pelvis.

Q. And the other one?

A. This is D-14, this is another lateral view but it definitely a little bit poor, I don't think it is very much oblique, it is pretty much a lateral view of the pelvic area.

Q. Then all three X-rays you have testified to, being [15] X-rays marked D-12, D-14 and D-15, represent lateral X-rays of the pelvic area?

A. I don't quite—the answer is yes and no. You might not seek for it, you might seek for a specific area, but in general.

Q. General, fine. In addition to bone and the foreign object, do X-rays generally show soft tissue?

A. Not very well. They do to a limited extent to a qualified radiologist, which I am not.

Q. In other words, I take it from your answer, you cannot examine any of these X-rays and determine the existence or non-existence of soft tissue?

A. I think you could. Perhaps I misunderstood your question.

Q. I say do X-rays show soft tissue?

A. I said yes, to a limited extent.

Q. Examining X-ray D-12, do you see any soft tissue?

A. May I see it, sir? Well I can see shadows representing part of the soft tissue.

(Deposition of Dr. R. W. Cordwell.)

Q. Where do you see those in that X-ray, Doctor?

A. Every place there isn't bone, here is the back of the body here, probably this is the front, I couldn't be too sure.

Q. You are pointing to the low left corner of the X-ray? A. The way I am holding it.

Q. And there appears to be a foreign object in that lower [16] left corner, curved in nature?

A. That's right.

Q. And below that and to the edge of the film you traced out soft tissue?

A. I think it is soft tissue.

Q. That would be your opinion?

A. As far as I can tell on this film.

Q. Having examined these films, being D-12, D-14 and D-15, and assuming they were X-rays taken of plaintiff, would you have an opinion at this time as to the location of the foreign object, the surgical needle? A. Yes, I would.

Q. What would your opinion be, Doctor?

A. I would say it is outside the pelvis proper, outside of the abdomen.

Q. Cavity?

A. Here in front, outside the abdominal cavity. I want to make myself as accurate as possible.

Q. You first saw Mrs. Summers on the 5th of August of 1955, is that true, sir?

A. That's correct.

Q. At that time she complained, as you testified, to having had pain for the past week?

(Deposition of Dr. R. W. Cordwell.)

A. That's right.

Q. She gave you no history of having had pain prior to [17] the week before she came to you?

A. I have no history marked down that way, I don't recall.

Q. Had she told you "I have had pain four years, five years"?

A. I would have written it down.

Q. It would have been reflected by your records?

A. That's right.

Q. She further—you further testified, Doctor, she told you in 1949 she had a similar attack?

A. That is correct.

Q. What do you mean, Doctor, when you testified there was no rebound to pressure upon the stomach?

A. Rebound tenderness is considered a diagnostic sign of peritonitis. You push on the abdomen. It may or may not hurt. Usually hurts when you release it, if you have rebound tenderness, it hurts as the peritoneum slips upwards.

Q. What is peritonitis?

A. It is infection or inflammation of the peritoneum.

Q. When you apply this pressure you put good pressure on the patient?

A. As much as the patient can stand at the time.

Q. While you were doing this was there any particular complaint from the plaintiff as to localized pain?

(Deposition of Dr. R. W. Cordwell.)

A. May I see my records? [18]

Q. Yes, sir.

A. I have in the record that the pain was most marked across the lower abdomen.

Q. What area would that entail?

A. The lower abdomen would mean to me from the umbilicus on down.

Q. Would that be a large area or small area?

A. That would cover a reasonably large area.

Q. Would that cover the entire area from the navel on down?

A. Might be part of it.

Q. But there was general soreness?

A. That's right, and I have it marked.

Q. In other words, there was no particular localization of any complaint of pain?

A. You mean while I was examining her?

Q. During that examination.

A. It was just localized pain. There was more marked pain in the lower abdomen than there was in the upper, there was more marked tenderness, but there was some tenderness in the upper abdomen also.

Q. But it wasn't localized at one particular point on her body, it was general? A. Yes.

Q. If this surgical needle were to be such as to cause her pain and you were to put pressure on it, wouldn't that pain be localized? [19]

A. Would you re-state that question, please?

Q. If this needle were to cause her pain?

(Deposition of Dr. R. W. Cordwell.)

A. If the needle were the thing that was causing pain?

Q. That's right, and you were to apply pressure on that, wouldn't there be local pain by virtue of that pressure rather than general pain over the entire area?

A. That depends on many things. If there were quite an infection all around it might not make so much difference. If the needle itself were causing the pain you would expect it, in my opinion, to hurt more as I pressed over the area of the needle.

Q. Your entire diagnosis of her was infection, as I understand it, in the vagina? A. No.

Q. That is what you treated her for?

A. No, the infection was in the pelvic region. That includes the vagina, those soft tissues in the lower part.

Q. What treatment did you prescribe for her?

A. I prescribed several things. Demerol for pain, I gave penicillin, streptomycin, hot douches, and later I gave her achromycin, which is a trade name for tetracycline, and then later I painted her vagina with gentian violet. That was the first time she was in the hospital.

Q. And the second time she was in the hospital, did you [20] give her substantially the same treatment, Doctor?

A. We changed the antibiotics somewhat. Gave her one which we call mycostatin, used for treatment of monilia, gave her erythromycin; substan-

(Deposition of Dr. R. W. Cordwell.)

tially the same treatment. Dr. Scott ordered hot Sitz baths also.

Q. Now, Doctor, assuming that this curved needle, surgical needle, was on the anterior of the peritoneum——

A. You mean in the anterior abdominal wall or outside of it?

Q. Outside of it. A. Yes.

Q. Could that have been the basis of the difficulty of which she complained and you treated her for, this infection in the pelvic area?

A. I don't think it was the cause and I told her that at the time.

Q. In other words, you told her this needle was there? A. Yes.

Q. What did she say?

A. I don't remember exactly.

Q. She made no complaint of having any particular complaint? A. I don't recall.

Q. Doctor, did she ever complain to you, I am referring to her complaint, that by virtue of this needle she had pain from intercourse?

A. I don't know, I don't have it marked down.

Q. Had she told you that wouldn't you [21] have marked it down? A. Probably.

Q. And you didn't? A. I didn't.

Q. Referring again to the complaint of the plaintiff, Doctor, are there any female organs located in the area of the needle as shown by Exhibit number, in the area, referring to Exhibit D-12,

(Deposition of Dr. R. W. Cordwell.)

where the needle is located in the lower left-hand corner?

A. The question was are there any female organs located in that area?

Q. Assuming the needle is located on the outside of the pelvic cavity, would there be any female organs in close proximity to the surgical needle?

A. The thing that makes me pause is when you say "close proximity", what do you mean?

Q. I mean so the needle could touch them?

A. No.

Q. Now, Doctor, it's a fact, isn't it, that you use different needles in closing the cavity after performing a hysterectomy for the different layers of tissue you go to close? A. Yes.

Q. What type needle do you use to close the peritoneum?

A. Round needle, I am talking about what I use, you understand that. [22]

Q. Is it common practice to sew that peritoneum? A. Yes.

Q. Now what is the next level you are going to close on the cavity as you come towards the surface?

A. This is on abdominal surgery with low mid line incision?

Q. Yes. A. Next would be the fascia.

Q. What type tissue is that, tough?

A. Yes, tough connective tissue.

Q. What are the accepted procedures of closing that, Doctor, as employed in this area?

(Deposition of Dr. R. W. Cordwell.)

A. I can speak only for myself and associates because I have never seen anyone else in this area operate. We close it usually with interrupted sutures on a round needle. Occasionally we would use continuous suture but I would also employ a round needle.

Q. Have you ever used surgical clamps to close that? A. No, sir.

Q. Do you know, sir, is that done in this area?

A. Not that I know.

Q. It is accepted practice, surgical clamps, metal sutures?

A. Wire sutures, sure, we use those. More often in the upper abdomen. [23]

Q. Would you describe a wire suture?

A. Just a long piece of steel wire.

Q. How is it applied in closing the fascia?

A. It can be employed several ways. The way we use it is a figure eight, come over and back and tie a square knot.

Q. Is that left in the patient? A. Yes.

Q. How long does it stay? A. Forever.

Q. Would that be a foreign body?

A. Yes, steel.

Q. Would that be steel similar to a steel needle?

A. I think so.

Q. Would there be any trouble from that, Doctor? A. No more than any other suture.

Q. How many figures eights or knots do you make?

(Deposition of Dr. R. W. Cordwell.)

A. You mean how many sutures you make? You put in one and then another one, they are interrupted and not continuous.

Q. How many would it take to close such a cavity, particularly on a person the size of the plaintiff?

A. Seven or eight, nine, around there.

Q. And they would remain with the patient until death unless you went in and took them out?

A. That's right, unless they caused trouble. [24]

Q. Have you ever experienced trouble in using that type suture? A. Yes.

Q. But you continue to do so?

A. Continue to use sutures?

Q. Yes. A. Yes.

Q. What other foreign body do you use or employ in the human body in the repair of it, particularly as far as limbs or joints are concerned?

A. You mean limbs or joints? What you call non-absorbable sutures, cotton, silk, sometimes nylon.

Q. They don't absorb?

A. They just stay there.

Q. In the repair of femur heads, sometimes they become necrotic or dead because of lack of blood supply, sometimes plastic heads are inserted, sometimes metal heads are inserted and they are held in place by an intramedullary nail?

A. They are not, that type of thing is usually screwed in, you use plates and intramedullary pins and screws, type of nails associated with plates in

(Deposition of Dr. R. W. Cordwell.)

fixation of different fractures. There must be others but I don't think of them offhand.

Q. Now, Doctor, you testified that in palpitating the stomach you felt no masses, do you recall that?

A. Could I correct that? I wasn't palpitating.

Q. What would you say would be the correct statement? [25]

A. I palpated her abdomen, I felt no masses.

Q. Assuming this surgical needle was infected, wouldn't you expect to find mass or hardness in that area?

A. Well, if it is in the abdominal wall, as it appears to be in these X-rays, then you would expect to find something, hardness.

Q. In other words, your answer is based upon the assumption the needle was located outside the cavity? A. That's correct.

Q. And had it been located outside the cavity there you would expect to find some hardness or mass?

A. Some hardness, I would say.

Q. You found none?

A. None to my recollection.

Q. And you have no recollection of advising or recommending that the needle be removed, as I recall your testimony?

A. No, I don't remember advising removal or non-removal. I don't remember saying either way, against it or for removal that I recall.

Q. As I recall your testimony, sir, on direct

(Deposition of Dr. R. W. Cordwell.)

examination, you stated if it were causing her difficulty you would have advised having it removed?

A. If I had thought it was causing difficulty, I would have advised removing it. [26]

Q. Did you advise her?

A. Not that I remember.

Q. Therefore could we form an opinion that you felt it was not causing the difficulty?

A. I remember my feeling about it at the time and I personally did not feel it was causing her difficulty.

Q. That would be your opinion as a doctor?

A. That is right.

Q. Did she recover from this condition you were treating her for, Doctor?

A. I don't know. You see I never saw her again after she left the hospital. She was recovered enough at the time to leave the hospital or I would never have let her go but I don't know what happened after that.

Q. She never returned for further treatment?

A. No.

Mr. Miller: I think that's all.

Redirect Examination

Q. (By Mr. Doepker): Would you, as a surgeon, recommend that a surgical needle be left in the wall of the abdomen of a patient?

A. No, I would not recommend it be left there.

Mr. Doepker: That is all. [27]

(Deposition of Dr. R. W. Cordwell.)

Recross Examination

Q. Doctor, there are different ways it might be left there, isn't that possible? A. Yes.

Q. In other words—

A. How do you mean, originally?

Q. Yes. A. Yes.

Q. And assuming it was left there without intent, without knowledge, couldn't that be, in your opinion, an accident?

Mr. Doepker: Just a moment, we object as improper redirect examination and also calling for an opinion of the witness upon a subject which is the province of the jury to decide under all the evidence of the case.

(Question read by reporter.)

A. Yes.

Q. Doctor, in the performing of an operation in this area and the suturing, as you have testified to, isn't it a common thing the needle will break, eyes will break out of them? A. Yes.

Q. What is the average, if there be an average, that you would expect to experience in doing this type of operation in having needles break?

A. I really don't know how to strike an average. I am sure you break at least one needle in operations of this sort.

Q. Assuming this needle is broken, assuming it is given [28] to the count nurse and assuming the count checks, has the physician done all he can do?

Mr. Doepker: We object to this as improper

(Deposition of Dr. R. W. Cordwell.)

recross examination and also that it is related to the ultimate question of the jury in the case to decide and not the subject of opinion evidence by any expert.

(Question read by reporter.)

A. Done all he can do?

Q. Insofar as that particular needle is concerned, Doctor? A. I expect so.

Q. What do you do if you happen to break a needle?

A. You always try to get it out, usually part of it breaks off and you have in clamps and I give it to the nurse, you fish it out and give it to the nurse and she is supposed to throw it away.

Q. You give it to the instrument nurse?

A. Yes.

Mr. Miller: That's all.

Re-Redirect Examination

Q. (By Mr. Doepker): With respect to all that a physician may do, he could make a recount if he thought there was a broken needle that hadn't shown up from the ones that had been used in the operation? A. He could, yes. [29]

Q. Wouldn't it be a very unusual circumstance to count the needles and have them count out correctly and then later discover that one had been left in some part of the body during the operation?

A. All I could say is that we usually don't count our needles. When one is broken it is thrown away

(Deposition of Dr. R. W. Cordwell.)

immediately off the table into a bucket and there are three or four people watching every needle.

Q. And then you do not count the needles before or after the operation?

A. No, sir, we count sponges and so forth.

Q. Then if a needle is broken you throw it away immediately after it is broken?

A. That's right.

Q. And that needle is not thrown away in the patient, it is thrown in some receptacle?

A. On the floor, the receptacle is kept on the floor.

Q. The broken needle isn't thrown away in the patient you are operating on?

A. Not on purpose.

Q. That wouldn't be good practice?

A. No.

Q. How do you determine, Doctor, in your re-direct upon your cross examination, how do you determine how all the needles used in the operation are taken out and are available after the operation [30] to be sure you haven't left a needle in the patient if you don't count them?

A. Well, as we use a needle, it is in a needle holder, we don't use it in our hand, a whole needle is turned back to the instrument nurse who keeps track of our instruments and after we are done with that particular needle she puts it on the instrument table beside her, we don't use the instruments on that, a small table, and if a needle is

(Deposition of Dr. R. W. Cordwell.)

broken we hand it to her, both parts, she picks it up and drops it into the bucket on the floor.

Q. I see, that is all.

Re-Recross Examination

Q. (By Mr. Miller): Isn't it possible a needle would get in a patient without someone throwing it in the patient?

A. I could see how that could be done.

Q. How many instruments do you have under your control while performing a hysterectomy, including needles?

A. You want me to enumerate them?

Q. What is a good estimate?

A. Probably at least 50 to 100.

Q. How many different needles would you have at your disposal or use? A. At least 20.

Q. You anticipate you are going to break [31] needles by having that many available?

A. Needles are fragile instruments.

Q. Now, Doctor, from your examination of the X-rays you have testified to, being D-28 and D-29, in your examination and careful study of those did you find the eye of a needle?

A. I don't recall it. No, I don't think there is an eye in that needle, not by those films.

Q. Doctor, recognizing that this is a surgical needle, curved in the middle, and having examined X-rays to determine its location, do you have an opinion as to whether or not that needle would move and travel through the body?

(Deposition of Dr. R. W. Cordwell.)

A. I have an opinion.

Q. What is your opinion? A. I doubt it.

Q. Your opinion would be that it would not, in your opinion?

A. That is probably true, that is an opinion.

Mr. Miller: That's all.

Mr. Doepker: That's all.

(Witness excused.)

/s/ ROBERT W. CORDWELL, M.D.,
Deponent. [32]

[Endorsed]: Filed September 18, 1958.

[Title of District Court and Cause.]

DEPOSITION OF DR. PAUL M. ELLIS

Be It Remembered, pursuant to stipulation of counsel, the deposition of Dr. Paul M. Ellis was taken in the District Courtroom of the Shoshone County Courthouse, Wallace, Idaho, on the 26th day of August, 1958, said deposition being taken immediately following the taking of the deposition of Dr. Hubert E. Bonebrake. Present at the taking of said deposition were the following: Elsie Summers, plaintiff, with her attorneys of record, Mr. James W. Ingalls and Mr. M. J. Doepker; Paul M. Ellis, deponent, with his attorney of record, Mr. E. L. Miller; Merle Myers, Deputy Clerk of the First Judicial District of the State of Idaho, before whom said deposition was taken, and Irene

Vermillion, Court Reporter, who took said deposition down in shorthand and later transcribed the same into typewriting.

Whereupon the following proceedings were had and done, to-wit:

DR. PAUL M. ELLIS

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Doepker): Will you please state your name? A. Paul M. Ellis.

Q. Is that Paul N.?

A. "M" as in May.

Q. Someway we got the letter "L." What is your profession? A. I am a surgeon.

Q. And have been practicing your profession in Wallace, Idaho for a period of years, have you?

A. Yes, 28 years.

Q. During that time have you been connected with the Wallace Hospital? A. Yes.

Q. And are you at the present still connected with the Wallace Hospital? A. I am.

Q. During the course of your practice as a surgeon, Dr. Ellis, have you had occasion to have as your patient Elsie Summers at any time?

A. She consulted me one afternoon for a small infection of her ear which had resulted from piercing for an earring. [2] I can't tell you the date, I think I have it in my notes.

(Deposition of Dr. Paul M. Ellis.)

Q. I was going to ask in connection with any treatment of her you had occasion to make notes?

A. The only time I did was October, 1952. This is on the office notes. This is a typewritten copy.

Mr. Miller: That's a recapitulation.

A. This is just some notes that were typed and photostated for my reference. The only other time I have had any connection with her in a medical way at all is assistance at surgical procedures.

Q. At the time of the original surgery in 1951 you were one of the surgeons in attendance?

A. I was in the operating room, yes, sir.

Q. Did you have any part of the operation which involved the suturing after the removal of the parts that had been removed yourself, were you doing any of this suturing or sewing?

A. The assistant usually takes hold of the suture, may tie knots, may cut it. I held sutures. Whether I did any actual suturing I would not be able to say.

Q. At any rate you are not making records?

A. No, I am acting as a surgical assistant in a routine manner.

Q. Then subsequent to March of 1951 did Mrs. Elsie Summers contact you at any time in the development of the case, report to you about it? [3]

A. As far as I know, no.

Q. You don't have any record at any rate?

A. There is no record of my doing so except the one exception.

Q. At the time in 1953 that the gall bladder

(Deposition of Dr. Paul M. Ellis.)

examinations were being made, were you present at those, Doctor, or not?

A. I couldn't say, I don't know.

Q. Don't have any record or notes about it?

A. No.

Q. Going on to this period of 1956 at the time there was an operation or a probing looking to the location of a foreign body in the abdomen of Elsie Summers, were you there?

A. I was present in the surgery as surgical assistant when the needle was removed.

Q. And I presume your recollection was the needle was found at the position as explained by Dr. Bonebrake at that time? A. Yes.

Q. Did you make any independent investigation to determine whether there was any scar tissue to determine whether the needle had moved prior to the operation?

A. The tissues were presented to my visual inspection at the time the needle was removed.

Q. And it did not show any trailing or moving of the needle in the body of the plaintiff, is that right? A. No. [4]

Q. Do you know whether that is—sometimes a layman is told that needles will travel through various parts of the body, is that possible?

A. I have never known it to happen; this being a round needle it would be a little difficult.

Q. For it to travel? A. Yes.

(Deposition of Dr. Paul M. Ellis.)

Q. You are connected as one of the members of the Wallace Hospital, you are one of the partners?
A. Yes.

Q. I think that's all.

(Witness excused.)

/s/ PAUL M. ELLIS,
Deponent. [5]

[Endorsed]: Filed September 18, 1958.

[Title of District Court and Cause.]

DEPOSITION OF ELSIE SUMMERS

Taken at Coeur d'Alene, Idaho, August 27, 1958, before Harold E. Peterson, Deputy Clerk of District Court, Kootenai County, Idaho.

Appearances: James W. Ingalls, Esq. and Messrs. Doepker and Hennessey, by Mark J. Doepker, Esq., for the plaintiff; Messrs. Hawkins and Miller, by E. L. Miller, Esq., for the defendants. [1]*

Deposition of Elsie Summers, a witness of lawful age, plaintiff in the above-entitled action, taken by the defendants in said action wherein Elsie Summers is plaintiff, and Wallace Hospital, Paul L. Ellis, Hubert E. Bonebrake, and Lewis B. Hunter, a co-partnership, and Hubert E. Bonebrake, M.D., individually, are the defendants, pending in the District Court of the United States for the Dis-

* Page numbers appearing at bottom of page of Original Deposition.

trict of Idaho, Northern Division, pursuant to stipulation herein set forth by counsel for the respective parties present, before Harold E. Peterson, Deputy Clerk of the District Court in and for the County of Kootenai, State of Idaho, at Coeur d'Alene, Kootenai County, Idaho, on August 27, 1958.

Mr. Miller: Is it agreeable, gentlemen, for the record to state this is the time and place agreed upon by attorneys for plaintiff and attorney for defendants for the taking of the deposition of Mrs. Elsie Summers upon oral interrogation as an adverse witness under Rule 26 of the Federal Rules of Civil Procedure; that counsel reserves objections to all questions and answers except as to the form of the question; and that the deposition may be used or employed at any stage of this proceeding or at trial in accordance with the Rules of Federal Procedure? [2]

Mr. Doepker: Agreeable.

Mr. Miller: May the witness be sworn, and the record so show.

ELSIE SUMMERS

plaintiff in the above-entitled action, having been called for cross examination as an adverse witness by the defendants, being first duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Miller): Mrs. Summers, would you please state your full name?

(Deposition of Elsie Summers.)

A. Elsie Summers.

Q. Where do you reside, Mrs. Summers?

A. Butte, Montana.

Q. What is your age? A. Forty-five.

Q. Are you married? A. Yes.

Q. Residing with your husband? A. Yes.

Q. I understand that you have some children?

A. Yes.

Q. How many children do you have?

A. Five.

Q. How many of them reside at home? [3]

A. There is two.

Q. What are their ages, the two that are at home? A. Well, twenty-one and twenty.

Q. They are employed? A. Yes.

Q. Self-sustaining? A. Yes.

Q. Are you employed, Mrs. Summers?

A. Yes.

Q. What is your occupation?

A. Practical nurse.

Q. Where are you employed?

A. County Hospital.

Q. Is that the name of the hospital?

A. Yes.

Q. That is located in Butte, Montana?

A. Yes.

Q. How long have you been employed there?

A. I have been employed since June.

Q. In what year? A. This year.

Q. Where were you employed before that?

A. Summit Valley Sanitarium.

(Deposition of Elsie Summers.)

Q. How long were you employed there?

A. A year. [4]

Q. Where is that? A. In Butte.

Q. Previous to your employment at the sanitarium, where had you been employed?

A. I was in the hospital.

Q. At Wallace or Kellogg? A. Wallace.

Q. In 1956? A. Yes.

Q. Prior to 1956, where were you employed—at the time you spoke of being in the hospital?

A. Will you repeat your question?

Q. Prior to the time in 1956 that you have testified you were hospitalized, where had you been employed?

A. I was—do you mean if I was living in Butte at the time?

Q. My question is: Prior to your being hospitalized, as you have testified to in 1956, where were you employed at that time?

A. Well, I had just moved to Butte.

Q. Did you leave your employment prior to moving to Butte? A. Yes.

Q. Where had you been employed at that time?

A. At the Sister's Hospital. [5]

Q. Where was that located?

A. In Wallace.

Q. Is there another name for that hospital?

A. Providence.

Q. How long had you been employed there?

A. I don't remember just exactly the amount

(Deposition of Elsie Summers.)

of time I was employed there. About a year, I think.

Q. Approximately twelve months, you would say?
A. Yes.

Q. And previous to the time that you were employed at the Providence in Wallace, where had you been employed?

A. At the County Hospital in Wallace.

Q. How long were you employed there?

A. Since '47.

Q. Then you would have been at the County Hospital in 1951 or approximately that time?

A. Yes.

Q. Then you have spent how many years in your employment as a practical nurse?

A. Ten years.

Q. Where did you take the training for that?

A. In Wallace.

Q. Your first job was with the County Hospital?

A. Yes.

Q. What does your husband do? [6]

A. He is a boilermaker.

Q. By whom is he employed?

A. Victor Chemical.

Q. How long has he been employed by that organization?
A. A year.

Q. Previous to that, where was he employed?

A. That is in Butte, Montana. A C M.

Q. How long had he been employed by them?

A. Three years.

(Deposition of Elsie Summers.)

Q. Previous to that, where had he been employed?

A. Day Mining Company in Wallace.

Q. How long was he employed by them?

A. I don't remember the exact time.

Q. Mrs. Summers, how long had Doctor Bonebrake acted as physician for you prior to 1951?

A. Since 1947.

Q. From 1957 through 1951?

A. That's right.

Q. He had been the physician for your entire family? A. That's right.

Q. In addition to Doctor Bonebrake, did you have occasion between 1947 and 1951 to contact other doctors at the Wallace Hospital?

A. Only if Dr. Bonebrake was out.

Q. Who would you then consult? [7]

A. Well, I saw Doctor Gnaedinger.

Q. Isn't it a fact that you consulted Doctor Hunter there too at that hospital at one time, Mrs. Summers, in that period of time, 1947 through 1951? A. No.

Q. You did not?

A. Well, yes, excuse me. I did. He entered me one evening.

Q. That was at the start of the difficulties you had in 1951 which later required surgery?

A. Yes.

Q. And you contacted him at or about what time, Mrs. Summers? Do you recall?

A. I don't know when exactly. Do you mean—

(Deposition of Elsie Summers.)

Q. When you saw Doctor Hunter.

A. (*D.B.) It was the 14th day of March of 1951.

Q. You have since yesterday examined the records and files and depositions in this case, have you not?

A. I think so.

Q. Well, have you? A. Yes, I have.

Q. You have examined them and are acquainted with their contents? A. Yes.

Q. That was prior to your deposition here today? (D.B.) [8] A. Yes.

Q. Now, do you recall what your difficulties were at the time you saw Doctor Hunter?

A. Yes, I had pains in the abdomen and in the lower part of my back.

Q. Now, these back pains, you have had these for a period of years, have you not? A. No.

Q. But you had them when you saw him in 1951? A. No.

Q. Well, I asked what complaints you had at the time you saw Doctor Hunter—at the time you testified to. Your answer was that—

A. That was March of '51 we are referring to?

Q. Yes.

A. When I went in, I was sick.

Q. What were your complaints?

A. I didn't know what was wrong.

Q. Did you have back pains at that time?

A. No, not then. I did not.

Q. Did you have abdomen pains at that time?

A. No.

* (D.B.) Refers to corrections on pages 148-149.

(Deposition of Elsie Summers.)

Q. Well, what was your condition for which you needed a physician's help?

A. Well, I was sick. [9]

Q. What were the manifestations or feelings that you had?

A. Well, I was just sick. I went to the doctor to see what was wrong.

Q. In what part of your body was the trouble?

A. My whole body.

Q. Then it would be your back too?

A. Well, my whole body. I was just sick, the way that I had been menstruating.

Q. You were having female trouble at that time?

A. If you want to call it that.

Q. Well, you were having some difficulty with your menstrual periods, were you not?

A. Yes. I was regular.

Q. Continuous? A. That is right, yes.

Q. Was that unusual for you? A. Yes.

Q. You saw Doctor Hunter for medical aid or treatment?

A. The night that I went to see him, it was late. He checked me in and he gave me some medicine and told me to go home.

Q. I see. Did you follow what he prescribed?

A. Yes.

Q. What did you do then? [10]

A. He said if it didn't help me to come in again.

Q. So Doctor Hunter prescribed for you?

A. Yes.

(Deposition of Elsie Summers.)

Q. In addition to your menstrual troubles, did you have other symptoms or pains?

A. No.

Q. It only was menstruation. Was that itself painful? A. Well, no.

Q. Then the only complaint you had was that you were menstruating unaccompanied by any pain? A. That's right.

Q. Now after you had taken the medicine, what did you do then?

A. I went back to the hospital.

Q. Whom did you see?

A. Doctor Bonebrake.

Q. Do you recall the date that you saw him?

A. No, I don't recall the date off-hand.

Q. Well, the month and year?

A. Not off-hand, I can't. Well, it was in March of '51.

Q. Well, isn't it a fact that you saw Doctor Bonebrake on or about the 25th day of March, 1951?

A. I believe that is right, and my operation was the 28th.

Q. And you had seen him several days before that time, on the 25th? [11]

A. I had seen Hunter.

Q. Well, you had seen Doctor Bonebrake after that? A. Yes.

Q. State whether or not you were or were not seeing him regularly? A. Yes.

(Deposition of Elsie Summers.)

Q. Now, at the time that you visited him after seeing Doctor Hunter, did he hospitalize you?

A. Yes.

Q. What was your difficulty?

A. Still menstruating.

Q. Is that the only complaint that you made to him? A. Yes.

Q. You did not complain of pain any place in your body? A. No.

Q. You are familiar, I presume, as a practical nurse with hospital records, and you understand how they are kept? A. Yes.

Q. And you understand they are kept on the basis of what the patient relates to the doctor?

A. Yes.

Q. You state that at or near that time you didn't complain to Doctor Bonebrake that you had had a pain in the vagina since about the 8th of February with a lower abdomen pain? [12]

A. If you were menstruating that much, you would get sore too.

Q. There would have been abdominal pains in this menstruation?

A. Well, I was menstruating so much, yes.

Q. When did you start to have this abdominal pain?

A. When I kept on menstruating, but I can't say just how long. I was just menstruating. It was after that operation I developed that lower abdominal pain. It was more in the vagina before.

Q. Well, the area you are referring to as the

(Deposition of Elsie Summers.)

abdomen is between the navel and the pubic region of the body? A. Yes.

Q. That is where this lower abdominal pain was located? A. Yes.

Q. Now, what treatment was given to you when you were hospitalized by Dr. Bonebrake at the time you testified to, Mrs. Summers?

A. Well, you mean the day they put me in for surgery?

Q. What kind of operation did you have?

A. Hysterectomy.

Q. Isn't it a fact that you had a vaginal exploratory prior to the hysterectomy?

A. Will you repeat that?

Q. Isn't it a fact the vaginal exploratory was [13] undertaken prior to the time that you were operated on for this hysterectomy condition?

A. That wasn't a separate operation; that was included in the operation.

Q. It was done at the same time?

A. It was before the operation was done.

Q. How many days before was that done?

A. I don't know.

Q. You don't recall the operation, being under an anesthesia for that purpose, were you not?

A. Yes.

Q. And being a practical nurse and so trained, you were interested in the result of that exploratory procedure? A. Yes.

Q. Did Doctor Bonebrake discuss it with you?

A. He told me I needed an operation.

(Deposition of Elsie Summers.)

Q. Did you have a discussion about the tissue that had been removed from you? A. Yes.

Q. You saw that? A. Yes.

Q. And you also discussed the reason why you needed surgery? A. Yes.

Q. And you agreed to it? [14]

A. Yes.

Q. And you knew it was necessary for your health and well-being? A. Yes.

Q. And you agreed to the surgery which was called for and required? A. Yes.

Q. Now when was this surgery performed upon you, Mrs. Summers?

A. 28th of March, '51.

Q. How long were you hospitalized after that?

A. Oh, a week.

Q. Approximately a week. Your recovery was uneventful? A. Yes.

Q. When you were discharged then after this week, how long was it before you resumed your employment?

A. Six months, approximately?

Q. During that time, did you see Doctor Bonebrake? A. Until he released me.

Q. When did he release you?

A. I don't know the date he released me.

Q. Was it in the six-month period?

A. Yes, before that, but I didn't go back to work for six months.

Q. What did you do? You told us you went back after six months. [15]

(Deposition of Elsie Summers.)

A. I went back to the County Hospital.

Q. You returned to your employment there?

A. Yes.

Q. Did this menstruating stop? A. Yes.

Q. And the discomfort associated with that diminished? A. For a few weeks it did.

Q. Did you go to see Doctor Bonebrake again about it? A. Yes.

Q. When was that?

A. About two months after the operation is when I went back.

Q. Approximately two months later you saw Doctor Bonebrake? A. Yes.

Q. Did he have his office records before him at the time he examined you?

A. I don't know.

Q. What examination did you have?

A. He put me in the hospital.

Q. What did he do?

A. He put me to bed. The nurses gave me a shot and hot pads. Five days I stayed in bed.

Q. Were you exrayed? [16]

A. No.

Q. Where was your pain?

A. Around the lower part of my abdomen, around the hips and back.

Q. What kind of treatment other than the shots and back treatment or heat did you receive?

A. That is all.

Q. At that time weren't you also troubled with stomach gas or stomach disturbances?

(Deposition of Elsie Summers.)

A. I was not.

Q. Now, when actually was the first time that you went back to the hospital after the operation?

A. I don't remember the date.

Q. The first time was not two months after the operation, was it, Mrs. Summers?

A. I know it was two months after the operation.

Q. Was that on or about the 31st day of July, 1952? That wouldn't have been the two months later?

A. No.

Q. Well, the records—

A. I do know I went back two months after the operation.

Q. What hospital? A. Wallace.

Q. You were confined there for five days?

A. Yes, sir. [17]

Q. At that time you state the treatment that was prescribed for you was heating pad to your back plus a shot?

A. That's right.

Q. And being a practical nurse, do you know what shot was being given to you?

A. No, I don't know because they didn't tell me.

Q. You paid no attention to that. Within this five-day period of time, were you or were you not comfortable?

A. No.

Q. Did you make a complaint to anybody?

A. Yes.

Q. Who did you complain to?

A. My husband.

Q. Anyone else? A. My children.

(Deposition of Elsie Summers.)

Q. You never complained to Doctor Bonebrake?

A. No, I kept telling him I was hurting in the abdomen and back and hips. All across (indicating), between, and down in here.

Q. You are indicating from your hips to the center of your stomach, is that correct?

Mr. Doepker: We object. She is not indicating her hips at all.

Mr. Miller: She went from her hips to the center of her stomach and lower abdomen. I saw her motion, Counsel. [18]

Mr. Doepker: All right.

Q. After the time you related to us, Mrs. Summers, were you subsequently hospitalized?

A. Yes.

Q. When was that?

A. The date I don't know.

Q. Well, can you tell us if it was any proximity to the time that you described as occurring approximately two months after?

A. I think it was in November of 1952.

Q. What hospital were you placed in at that time?

A. Wallace.

Q. Under whose care?

A. Doctor Bonebrake's.

Q. How many days were you there?

A. About five days.

Q. What complaint did you make at that time?

A. The same. My abdomen.

Q. Was that October of 1951?

A. 1952.

(Deposition of Elsie Summers.)

Q. And the other time that you testified to you were hospitalized five days was in 1951?

A. The same, yes.

Q. In other words, if the operation was in March, '51, and you were hospitalized for five days in '52, and you went [19] again in November, what year are you speaking of now?

A. I am speaking of '52 now.

Q. Then your doctor was whom?

A. Doctor Bonebrake.

Q. What complaint did you have at that time?

A. Abdomen pain and in my back.

Q. Were you kept in the regular part of the hospital? A. Pardon?

Q. Were you kept in the regular part of the hospital?

A. In the women's ward. I was put to bed.

Q. You were subject to nurses' supervision?

A. Yes.

Q. They had a bed chart for you?

A. Yes.

Q. That was in 1952—November of 1952?

A. Yes.

Q. What treatment did you receive at this time?

A. The same.

Q. The same what?

A. Just put to bed. The shots and heat pads. No exrays.

Q. No exrays, and that was your entire treatment?

A. The first exray was taken in '52.

(Deposition of Elsie Summers.)

Q. We are speaking of November of 1952, Mrs. Summers.

A. In '52 there was one exray taken. [20]

Q. When was that taken?

A. I can't be sure of the month in '52 the first exray was taken.

Q. It was taken during the hospitalization treatment that you received?

A. What was your question?

Q. Was the exray related to the treatment you received while you were hospitalized?

A. Why sure.

Q. You testified that you were hospitalized in March of 1951 for the surgery. You testified that two months after, in May or June, that you were hospitalized again for treatment. A. Yes.

Q. You testified that the next hospitalization was in November of 1952 for treatment?

A. Yes.

Q. When was that exray taken?

A. When I went back in November of '52. I'm not sure of the date, but that was the first time an exray was taken.

Q. You were hospitalized at that time?

A. Yes.

Q. Now, were you working in 1952 at the hospital? A. Yes.

(D.B.) Q. Isn't it a fact that at or near that

(Deposition of Elsie Summers.)

time you sustained a head injury while working at the hospital? [21]

A. That has no bearing on this question.

Q. I would be the judge of that. You answer the question.

(D.B.) A. Yes, I had a head injury.

Q. At or near the time that you are referring to here? A. Yes.

(D.B.) Q. And that injury was caused by an object falling upon (D.B.) your head?

A. That's right.

Q. You had Doctor Bonebrake treat that injury? A. No.

Q. Who treated it?

A. The doctors at the Providence Hospital.

Q. Weren't the exrays taken at the Wallace Hospital at that time?

A. Yes. That was different. I had a finger broken.

Q. When was that?

A. I don't remember the month.

(D.B.) Q. Well, to refresh your recollection, was that the time that you turned the matter over to Mr. Taylor. Do you remember that?

A. Yes.

Q. When was that?

A. I don't remember the date.

Q. Was there subsequent litigation over that?

A. I think that happened in '53. [22]

Q. Was there litigation over that? A. No.

Q. Well, did you have a trial over the situation?

(Deposition of Elsie Summers.)

A. No.

Q. That is not with the broken finger?

A. No.

Q. Did you in fact have a hearing with the Industrial Accident Board?

A. That was through the Providence Hospital.

Q. Was it or was it not a trial? A. Yes.

Q. You were represented by Mr. Taylor?

A. I was represented through one in Boise and one in Wallace.

Q. You had two attorneys? A. Yes.

Q. Mr. Hull of Wallace was the other attorney?

A. No, Taylor was.

Q. Was Taylor your lawyer? A. Yes.

Q. Then Hull was the opposing counsel?

A. Yes, they are together.

Q. What do you mean "they are together"?

A. Well, they are in the same office. [23]

Q. Partners practicing together?

A. Yes, I think so.

Q. You do not have a very accurate memory of that? A. Not too much, no.

Q. In other words you have difficulty remembering the events happening so long ago in time as we are referring to?

A. With my hand, yes.

Q. But everything concerning or occurring during this time you have a good memory of otherwise?

(D.B.) A. Pretty good.

Q. Now, you said in November of 1952 you

(Deposition of Elsie Summers.)

made complaint of a lower abdominal pain, and you also were treated in the hospital within two months after the operation. Who was attending you in November 1952?

A. Doctor Bonebrake.

Q. Doctor Bonebrake? A. Yes.

Q. And when did you return to your employment? A. Three weeks later.

Q. Your records would show these dates that you speak of? A. Yes.

Q. You have no objection to our obtaining those records? A. If they have them.

Q. Do you know whether they have? [24]

A. No.

Q. Have you made inquiry so as to ascertain their availability? A. No.

Q. When was the next time you saw Doctor Bonebrake? Or any doctor at Wallace?

A. After 1952 I seen Doctor Bonebrake in 1953.

Q. What time and where and under what circumstances?

A. Well, as I say it was just the pain in my abdomen and back.

Q. The same pain in your abdomen and back?

A. Yes. He also took exrays for gall bladder.

Q. Were you hospitalized at that time?

A. It was out-patient treatment.

Q. Did you ever see the exrays he took, Mrs. Summers? You saw three of those yesterday?

A. Yes.

Q. You examined them last night?

(Deposition of Elsie Summers.)

A. No.

Q. Could you establish the approximate time you saw Doctor Bonebrake in 1953?

A. Do you want the month?

Q. Just the month is fine.

A. I'm afraid not.

Q. During this time were you still working, [25] Mrs. Summers? A. Yes.

Q. Now, after the examination for gall bladder, did Doctor Bonebrake prescribe any course of treatment for you? A. No.

Q. None at all? A. No.

Q. And what did you do?

A. Well, I didn't do anything. I was just suffering with my back.

Q. Just the back?

A. And the abdomen pain.

Q. When, if anytime after that, did you contact Doctor Bonebrake or his associates at Wallace Hospital?

A. I remember in '54 I went back with the same back and abdomen pains. I was suffering something fiercely.

Q. Did you see Doctor Bonebrake?

A. Doctor Gnaedinger admitted me.

Q. Prior to that entry you had some difficulty at home with your husband, isn't that true?

A. No.

Q. You hadn't had a dispute there before you came to the hospital crying and somewhat upset?

A. No.

(Deposition of Elsie Summers.)

Q. Now, you related to the doctor at that time, [26] Doctor Gnaedinger, the complaint that you had?
A. That's right.

Q. You gave him the history?

A. That's right.

Q. Isn't it a fact that you at that time told him that you had been upset with some kind of trouble at home in the morning?

A. No. I don't know. No.

Q. Is it possible that you did? A. No.

Q. If the records so reflect, the records are inaccurate?

(D.B.) A. No.

Q. If the records so reflect that you made such a complaint, the records would then be inaccurate?

A. Whoever made that complaint—I know I didn't.

Q. What treatment did Doctor Gnaedinger prescribe?

A. The same as Doctor Bonebrake, he put me to bed the same way.

Q. Were there any examinations or exrays made of you? A. No.

Q. What treatment was given to you?

A. None.

Q. No treatment whatsoever?

A. None. [27]

Q. How many days were you hospitalized at that time, do you recall, Mrs. Summers?

A. Not any more than three or four days.

Q. For those three or four days you were in

(Deposition of Elsie Summers.)

the hospital under nurses' supervision and hospital records were kept, but so far as you know, no treatment was given to you?

A. That's right.

Q. Now, after 1954—strike that question. During that hospitalization, did you have occasion to see Doctor Bonebrake? A. Yes.

Q. Did he treat you at any time during that hospitalization?

A. He had shots and pills given and heat pads. I was in bed. Doctor Bonebrake came back to my bed.

Q. Now after that hospitalization, when was the next time that you were hospitalized?

(D.B.) A. I went back in August 1955.

Q. At any time between the time in 1954 and August, 1955, did you seek medical care or help?

A. I decided to change doctors.

Q. At about that time, wasn't there a large payment to be discharged for the Summers family owed at the Wallace Hospital? A. No.

Q. Isn't that one reason or the reason why you changed your doctor? [28] A. No.

Q. You never paid the bill at the Wallace Hospital? A. We were paying on it.

Q. Well, it was a sizeable bill that you owed there, isn't that a fact? A. Yes.

Q. And at that time, in August 1955, it was still a large bill? A. Not too bad.

Q. But it hadn't been paid?

A. We were paying on it.

(Deposition of Elsie Summers.)

Q. But there was some discussion about payment between your family and the hospital, was there not? A. Not to my knowledge.

Q. Not to your knowledge. Now, in August 1955, what doctor did you go to?

A. Doctor Cordwell at the Wardner Hospital in Kellogg.

Q. What were your complaints at that time?

A. Abdomen pains and my back.

Q. Isn't it true that your particular complaint was your infection or soreness in your vagina?

A. I had this abdomen pain so bad where I couldn't walk.

Q. Isn't it true that you told the doctor that your [29] vagina was very sore and you had pain there? A. It was abdomen pain.

Q. Would that in your opinion be reflected in the records now?

A. That's right; it would be.

Q. And isn't it a fact that at the time of that admission you had some pain for about a week before?

A. I had been suffering severely for a week, but I had it before.

Q. Did you tell the doctor you had this pain for that period of time? A. No.

Q. How long a period of time did you tell him you had it?

A. Ever since about four and a half or five years.

(Deposition of Elsie Summers.)

Q. Isn't it a fact that at that time you told him that you had similar trouble in 1949?

A. No.

Q. Were you hospitalized with Doctor Cordwell?
A. I was.

Q. In the Wardner Hospital? A. Yes.

Q. What treatment did he prescribe for you?

A. Well, he prescribed several treatments.

Q. What was done to you? [30]

A. The next morning I had examination and exrays.

Q. That would be what date according to your recollection?

A. That was on the 5th of August.

Q. Well, were you treated for infection of the vaginal cavity?
A. Yes.

Q. That treatment was continued with you for how long?
A. A week.

Q. Medications were administered to that area?

A. That's right.

Q. And you were subsequently discharged a week later?
A. Yes.

Q. Were you employed?

A. Not at that time.

Q. Were you still having the same pains?

A. My abdomen and my back. The exrays showed it and he found the surgical needle in me. Doctor Cordwell told my husband.

Q. Did he also tell you about it?

A. My husband didn't.

Q. Cordwell advised you of that.

A. Yes.

(Deposition of Elsie Summers.)

Q. You had some discussion with him about it?

A. Yes. [31]

Q. You heard his testimony which included his advice that in his opinion it was not causing any of the trouble of which you were complaining?

A. Yes.

Q. You heard the testimony to that effect?

A. I did not agree with that.

Q. You say the doctor is in error in making that statement under oath, and in your opinion that was causing the trouble? A. It was.

Q. And causing this infection of the pelvic area that you were complaining of? A. Yes.

Q. Did you know where this needle was located at anytime prior to August 1955?

A. I can't read exrays.

Q. You did not notice the needle at all at anytime until Cordwell found it and showed it to you—you knew nothing about it prior to that time?

A. I did not.

Q. Then at anytime prior to August of 1955, did you have knowledge there was or was not a needle? A. No, absolutely.

Q. Then you re-entered the Wardner Hospital some two days later? [32]

A. About a week later.

Q. He continued the same treatment to stop the soreness in the vagina and pelvic cavity?

A. Yes.

Q. You left there on August 30th?

A. Yes.

(Deposition of Elsie Summers.)

Q. Discharged? A. Yes.

Q. Were you at that time all right?

A. No.

Q. What was your trouble?

A. Still the same pains and soreness.

Q. You still had the same infection?

A. That's right.

Q. After you left, what doctors did you go to?

A. We moved to Butte.

Q. What doctor did you go to in Butte?

A. Doctor Macpherson.

Q. Were you under his care? A. No.

Q. What treatment did you receive?

A. I complained of my back and abdomen. He xrayed me.

Q. Will you please tell us what treatment you received?

A. Well, for treatments, I didn't have no treatment. When I complained of my abdomen, he took me in and examined me. [33]

Q. What treatment, if any, did he give you?

A. Well, he gave me an examination.

Q. Did he treat you? A. No.

Q. He found nothing which required treatment?

A. He gave me some medicine.

Q. What type of medicine?

A. I don't know. He didn't tell me.

Q. How did he administer these medicines?

A. I just took it.

Q. Orally? A. Orally.

Q. For your infection in your vagina, you

(Deposition of Elsie Summers.)

treated that with douches and other treatment prescribed under Doctor Macpherson?

A. He didn't prescribe douches. He tried to find the trouble, the pain in my back.

Q. Did he advise you at anytime that you have had an arthritic condition of the back for some years? A. No.

Q. Now, how long were you treated by Doctor Macpherson?

A. The first I seen Doctor Macpherson was January 4th of 1956.

Q. Then between the dates of August 30th, 1955, when Doctor Cordwell discharged you, and January 4th, 1956, you had [34] not been under the care of a physician?

A. I remember I had some pains. I was new in Butte. I was suffering. I had to just find a doctor. I just got him by random.

Q. Doctor Macpherson did not hospitalize you though? A. No.

Q. This treatment he administered to you was out-patient treatment? A. Yes.

Q. At no time while you were under his care were you hospitalized and treated? A. No.

Q. Is he still attending you?

A. Well, when I need him, yes.

Q. When did you next go to the doctor and enter any hospital?

A. I went to Doctor Macpherson on February 11th of 1956.

Q. You earlier date was incorrect?

(Deposition of Elsie Summers.)

A. No. That January 4th of '56 is when I first seen him. That is when he exrayed me, gave me my examination, and he also seen the needle.

Q. Well, you don't know that.

A. Yes, he showed it to me.

Q. What was it you actually saw?

A. Well, he showed it to me. [35]

Q. Now what happened on February 11, 1956?

A. I went back again. We were talking about the situation.

Q. All right, but then after that, what did you do?

A. He advised me to go back to Wallace to see Doctor Bonebrake.

Q. And you contacted him when?

A. Well, I don't know as my dates are just correct, but I'm not sure—I won't say for sure, but I think it was the latter part of February of '56, and the operation, I think, was performed the 20th of February, 1956.

(Recess.)

Q. I believe, Mrs. Summers, we left off before the recess at the date of approximately February 11th, 1956, when you saw Doctor Macpherson. Then did you or did you not see another doctor?

A. Yes.

Q. Who did you see?

A. Doctor Bonebrake.

Q. And what if anything was said at that time?

A. I told him that I had the surgical needle left in me during my hysterectomy operation in '51.

(Deposition of Elsie Summers.)

Q. What did Doctor Bonebrake say?

A. Well, let the technician find it.

Q. Did you have any other discussion than that?

A. No. [36]

Q. That was the entire conversation?

A. Yes.

Q. Were you exrayed again at that time?

A. Yes.

Q. What if anything was done?

A. He exrayed me in two or three different positions.

Q. I see. And did he show you those exrays?

A. No.

Q. He didn't show you the exrays?

A. No.

Q. Did you discuss the procedure for the removal of the needle? A. No.

Q. Did he show you where it was located?

A. Yes.

Q. Then he showed you the exrays?

A. He showed by his hand—motion of his hand just about where it was located, right down in here.

Q. Not within the abdominal cavity at all?

A. Yes, it was inside the abdomen.

Q. Do you know that for a fact?

A. Well, according to the exrays.

Q. You saw the exrays that he had?

A. I can't remember whether I seen them or the other doctor's exrays. [37]

Q. But isn't it a fact Doctor Bonebrake took some lateral exrays of you? A. Yes.

(Deposition of Elsie Summers.)

Q. You saw those exrays, didn't you, Mrs. Summers? A. No. I don't remember.

Q. Well, did you have some discussion with Doctor Bonebrake about the location being outside of the abdominal cavity?

A. No. It was inside the abdominal cavity.

Q. Did Doctor Bonebrake tell you that?

A. No.

Q. Who told you? A. Doctor Macpherson.

Q. He told you it was within the abdominal cavity? A. That's right.

Q. Now, did he take exrays? A. Yes.

Q. Did he take lateral exrays?

A. He said, "I found that within the abdominal cavity."

Q. Is Doctor Macpherson going to testify in this case? A. I can't answer that.

Q. To your knowledge, is he?

A. I don't know.

Q. Do you have any objection to our securing the exrays from Doctor Macpherson? [38]

A. No.

Q. You have no objection at all.

Mr. Doepker: We are going to have him available for his deposition, and you will have opportunity to see him and examine him before we go to trial on his findings.

Mr. Miller: She apparently has no objection to our sending interrogatories and obtaining the ex-rays, and we will so do.

Mr. Doepker: We will see whether you will. We

(Deposition of Elsie Summers.)

are running this case. We will find out whether it will be done or whether it can't be done.

Mr. Miller: Counsel apparently objects to the discovery procedure and our obtaining the exrays of Doctor Macpherson. The witness does not desire apparently to invoke the doctor-patient privilege.

Mr. Doepker: Let the record show the witness will waive the patient-physician privilege, and will present Doctor Macpherson as one of the plaintiff's witnesses under whatever order of the Federal Court is made. We prefer to have that conducted just the same as the proceedings have been conducted yesterday and today. Doctor Macpherson will have full consent of plaintiff to testify concerning his findings and everything in connection with his examination of the plaintiff without any objection on her part to his testifying. Just to [38] explain our purpose, I want to state our purpose is to have this proceed in an orderly fashion and not by writing a letter to him and having him answer a letter when we don't have a chance to be present there to preserve our rights at the examination. That is all.

Q. Now, you undoubtedly, when you contacted Doctor Macpherson on January 4th, 1956, told him that you had this needle in you?

A. That's right. I did.

Q. Did he exray you on January 4th or February 11th?

A. January 4th.

(Deposition of Elsie Summers.)

Q. But he did not schedule any immediate surgery or removal?

A. He didn't make arrangement for it, no.

Q. And you returned to Doctor Bonebrake in February of 1956? A. That's right.

Q. And for that purpose? A. Yes.

Q. And you did so upon your own or upon the recommendation of Doctor Macpherson?

A. Yes.

Q. Which was your choice, or was it Doctor Macpherson's?

A. We both agreed he was the man to do it.

Q. You had full confidence that he would remove it? [40] A. Yes.

Q. You had no reluctance about going back to Doctor Bonebrake to have it removed?

A. I wanted to. He left it there. Doctor Macpherson suggested that he should.

Q. You felt that he was competent or you wouldn't have gone back?

A. Yes. Doctor Macpherson said I could have it removed by——

Q. I don't want you to volunteer any conversation with Doctor Macpherson. Now, you don't recall the removal because you were under an anesthetic? A. Yes.

Q. You were discharged within how many days?

A. Within three days.

Q. Where did you go then?

A. I had to get a place and stay until I was released.

(Deposition of Elsie Summers.)

Q. How long was it before you were released?

A. Close to two weeks.

Q. You remained in the Wallace area for two weeks? A. Yes.

Q. All that time you were in contact with Doctor Bonebrake? A. That's right.

Q. What was the purpose of that contact? [41]

A. I had to have the stitches taken out.

Q. When was that done?

A. I don't remember the date.

Q. Who did you stay with during that period of time? Did you have children down there at Wallace?

A. No. None of them lives there, not any more.

Q. And then did you return back to Butte, Mrs. Summers?

A. Well, as far as I can remember and my dates are not too incorrect, I believe we arrived in Butte on March 5th.

Q. That would be 1956? A. Yes, sir.

Q. Now, you returned to your employment there in Butte how long after that?

A. If my memory is right, three months. I'm sure the records will show that.

Q. Three months after March 5th—that would be sometime in June—you resumed your employment? A. Yes.

Q. And that employment has been continuous at all times since that date? A. Yes.

Q. Do you still see Doctor Macpherson?

(Deposition of Elsie Summers.)

A. He hasn't treated me since February 11th, 1956.

Q. Are you still troubled with infection?

A. No. I haven't had a pain about me since that was removed. [42]

Q. Now, all during this period of time, as the medical testimony shows, from 1949 through August 1955 you were having difficulties with infection. A. Not in '49. From '51 on.

Q. You heard Doctor Cordwell's testimony. You did give him a brief history before he treated you in August 1955?

A. That is incorrect. I didn't say anything was wrong with me in '49.

Q. And Doctor Cordwell's records would be incorrect if they so reflected?

A. Would you repeat that?

Q. Doctor Cordwell's records would be incorrect if they so reflect that?

A. That is incorrect—in '49.

Q. Now, you are acquainted with plaintiff's complaint filed in this matter on your behalf?

A. Yes.

Q. And I assume that the information herein contained was based on information that you gave to your attorneys? A. Yes.

Q. And I presume that prior to the filing of this action that you read and understood the complaint? A. Yes.

Q. And they filed it on your behalf? [43]

A. Yes.

(Deposition of Elsie Summers.)

Q. You approved it as it was framed?

A. Yes.

Q. Now, you, yourself, are satisfied that the uterus had to be removed by virtue of the conditions that were present in 1951? A. Yes.

Q. And you are satisfied insofar as the removal of the uterus and the other aspects of the hysterectomy are concerned, except for the needle?

A. That's right.

Q. You do not contend that the uterus was removed in any wrongful way?

A. Yes, on account of the needle.

Q. Discounting for a moment the needle, Mrs. Summers.

A. Well, you will have to repeat that.

Q. Forgetting the needle for a moment, in the removal of the uterus and the performance of this hysterectomy you have no complaint?

A. I have.

Q. You have a complaint?

A. Yes. Before I was released, Doctor Bonebrake told me I might have a malignant tumor. I worry about that, and that is all along, and it still is a worry. I now have spots that I pass even now. [44]

Q. When did he tell you that you might have a malignant tumor?

A. When he released me in 1951.

Q. Did he tell you where the tumor was located or was possibly located? A. No.

(Deposition of Elsie Summers.)

Q. You have been examined by other doctors?

A. No.

Q. Well, didn't Doctor Macpherson examine you? A. Yes.

Q. Didn't Doctor Cordwell examine you?

A. Yes.

Q. Didn't Doctor Gnaedinger examine you?

A. No.

Q. What doctors examined you between 1951 and 1956?

A. Doctor Bonebrake, Doctor Cordwell, and Doctor Macpherson.

Q. And Doctor Gnaedinger? A. No.

Q. And as a result of those examinations was there found anything of a tumor after the operation? A. No.

Q. As a matter of fact before the operation there was discussion between yourself and Doctor Bonebrake concerning this growth in your uterus, was there not? [45] A. Yes.

Q. At that time Doctor Bonebrake sent some tissue to the pathologist for study as to whether it was malignant, and you saw the report when it came back?

A. I didn't see the report.

Q. You discussed the contents of that report with Doctor Bonebrake, did you not?

A. No, I didn't discuss it.

Q. Isn't it a fact that Doctor Bonebrake told you that the report stated that this was non-cancerous and there was no pregnancy involved?

(Deposition of Elsie Summers.)

A. No, there was pregnancies involved.

Q. What did the report say?

A. He said I had pregnancy in the tubes in 1951, that he was going to remove it.

Q. He told you in 1951 that prior to that you had pregnancy of the tubes? A. Yes.

Q. Now what, if any, other complaints did you have then?

A. The complaint is I've got the worry I still have right now of discharging nothing but blood.

Q. You are not under a doctor's care?

A. No, I am not.

Q. And this discharge of the blood, do you think [46] that would in any way be related to the operation and to the needle?

A. After I had the removal of the needle, I had no stabbing pain.

Q. You said you had some pain before the operation, at the time that you were menstruating in 1951 and you went to see Doctor Hunter and told him that you had an abdominal pain. Now, do you still have the abdominal pain?

A. No.

Q. But you had some pain before the needle was there with menstruation. A. Yes.

Q. That menstruation was causing the pain?

A. That was before the operation.

Q. That is correct. Now you are menstruating, you still have that—

A. I'm not menstruating. I'm just having spots now and then.

(Deposition of Elsie Summers.)

Q. Well, how frequently?

A. Once every two months, maybe every three months.

Q. What complaints do you make as to the removal of the uterus then? A. None.

Q. All right, now, what other, if any, complaints do you make, Mrs. Summers? [47]

A. None, only just the bleeding I have now and then. That is the worry I have right now.

Q. Is it your belief that your bleeding is a result of this needle? A. Yes.

Q. That is your belief. A. Yes.

Q. Has any doctor expressed the opinion that was the cause of your bleeding? A. Yes.

Q. Which doctor? A. Macpherson.

Q. And you have been seeing Doctor Macpherson?

A. I haven't seen him since the needle was removed.

Q. Well, it doesn't make sense that you complain Doctor Macpherson told you that while the needle was still in the abdomen and after the needle was removed you still had this bleeding that you are telling us about, that Doctor Macpherson said that bleeding is a result of that needle. That is your testimony? A. That's right.

Q. Now in what part of your body do you contend this needle was located?

A. Inside the abdomen.

Q. Near what then? [48]

(Deposition of Elsie Summers.)

A. I don't know if it's near anything. Doctor Macpherson explained it.

Q. Then you must have some knowledge as to its location. A. No.

Q. You have none?

A. He didn't explain the location. He showed me through the exrays. It was through the abdomen.

Q. It was through the abdomen?

A. Inside of the abdomen.

Q. What female organs was it near?

A. Well, it had to be close to it. I don't know.

Q. You don't know.

A. I do know, but I can't think of the name of it right now. The tubes.

Q. Weren't your tubes removed?

A. The needle was in the place where the tubes was laying.

Q. What part of your body do you contend is scarred by virtue of this needle?

A. What was that question?

Q. What part of your body was scarred by the needle?

(D.B.) A. The uterus was scarred by the needle.

Q. All right. Where do you contend that you were cut or bruised by this needle?

A. The uterus. [49]

Q. Now when did the bleeding commence or the menstruation commence after the operation?

A. The first time I noticed it was in May of—

(Deposition of Elsie Summers.)

pardon me, in June of '56. That is the first time I noticed it.

Q. June of 1956? A. Yes.

Q. That was after the needle had been removed?

A. That's right.

Q. Now you have heretofore testified that Doctor Macpherson told you that bleeding was the result of the needle. You testified he told you that on January 4th or February 11th before the needle was removed. This needle was removed in February 1956. The bleeding commenced after the needle was removed. How was he able to in January or February advise you, Mrs. Summers, that your bleeding was the result of this needle?

A. Well, I had my dates wrong, but I do know Doctor Macpherson advised me to have the needle removed.

Q. But you had no bleeding at that time?

A. Yes, I did. If I am wrong as to the date, you will have to excuse me.

Q. Now, do you wish to change your testimony, that June of 1956 is not the time you commenced menstruating or the bleeding?

A. Yes. I believe it was before the needle was removed. That is right. [50]

Q. Would Doctor Macpherson's records show that, do you think?

A. I don't know. Doctor Macpherson told me to have the needle removed or it would have serious consequences.

Q. But at no time—in the time from 1951 until

(Deposition of Elsie Summers.)

on or about, I think, August 6, 1955, did you know that there was a needle located within your abdomen?

A. I didn't know there was any needle inside of me until Doctor Cordwell told me.

Q. Then your answer is that during that period of time you didn't know it was there?

A. But I knew I had something or I wouldn't have felt (D.B.) faint like I did.

Q. And you heard Doctor Cordwell's testimony concerning his diagnosis that your trouble was unrelated to the needle?

A. I can't help what Doctor Cordwell said.

Q. You must have been satisfied with Doctor Cordwell or you wouldn't have gone to him?

A. I went there because that was the hospital my husband had gone to.

Q. You went to him. You must have had confidence in him. Did you or did you not?

A. Yes, I had confidence in him.

Q. You thought he was a competent doctor? [51]

A. Yes.

Q. You still feel he is a competent doctor?

A. No.

Q. You do not? A. No.

Q. Then it was a matter of six or seven months after you discovered the needle that it was removed? A. Yes.

Q. In your complaint you allege that immediately thereafter and on or about August 9th, 1955, you submitted to an operation for removal of that

(Deposition of Elsie Summers.)

needle. Did you advise your attorneys of that fact?

A. No, sir.

Q. That is not the truth, is it?

A. Yes, I advised him. Read that question again, sir.

Q. It says in your complaint that plaintiff immediately thereafter, on or about August 9th, submitted to a further operation.

A. No, that is wrong. That was the wrong date.

Q. You have difficulty in recalling dates, do you not?

A. No, I don't, not so much.

Q. Well,—

A. That is the wrong date.

Q. You certainly know it it was in February of 1956 the needle was removed? [52]

A. That's right.

Q. But if you couldn't remember when it was removed, it must not have been too an important event in your life.

A. Yes, it was.

Q. But you had no memory of it?

A. Yes.

Q. Now, after 1951, after the operation in 1951, how long was it before Doctor Bonebrake removed the stitches?

A. The hysterectomy you are talking about—eight to ten days.

Q. And thereafter he did nothing so far as treatment of that was concerned?

A. I was with Doctor Bonebrake from the time I was operated on until the time I moved to Butte.

Q. How many times would you say you went to him? You examined the records yesterday. You

(Deposition of Elsie Summers.)

should know, Mrs. Summers, when you saw Doctor Bonebrake.

A. I didn't examine the records yesterday.

Q. Well, then, tell us from your own recollection. A. I seen him numerous times.

Q. Everytime that you went to him, what did you complain of?

A. Of my abdomen and back pains.

Q. Now, let's get the dates straight. Actually you had the first operation in the hospital with Doctor Bonebrake on [53] or about March 25th, 1951, isn't that true?

A. March 14th. I was released on the 17th of March.

Q. March 14th. The next time was March 25th, 1951, isn't that right? A. Yes.

Q. And then next was July of 1952?

A. That was when the first exray was taken.

Q. You remember that now? A. Yes.

Q. That was the next time you were under Doctor Bonebrake's care in the hospital?

A. It was when that first exray was taken.

Q. In July of 1952? A. Yes.

Q. Then the next time in the hospital was in November of 1954 under Doctor Gnaedinger?

A. I went to Doctor Bonebrake in 1953.

Q. That was on a matter concerning your hand?

A. No, gall bladder trouble.

Q. Then the next time—I am speaking about when you were hospitalized now—was in November of 1954? A. Yes.

(Deposition of Elsie Summers.)

Q. The last time was in February of 1956?

A. That was when I was hospitalized, yes, and I had seen him other times in his office. [54]

Q. You were never hospitalized two months after the operation in 1951, were you?

A. The first pain was two months after; I went to the hospital to see Doctor Bonebrake.

Mr. Miller: May we have the question please, Mr. Reporter?

Mr. Doepker: We contend she has answered the question.

Mr. Miller: Read the question, Mr. Reporter.

(Question read.)

The Witness: I don't remember.

Q. Your earlier testimony to that effect was not based upon any present recollection you have of that?

A. I don't know. I do know I was back in to see him.

Q. You have no recollection as to having been in the hospital in November of 1953 with Doctor Bonebrake?

A. I was not in '53.

Q. Your earlier testimony as to that is incorrect?

Mr. Doepker: We challenge that. I don't think the record will show that in 1953.

Mr. Miller: The record will show that her testimony is that she was in the hospital in '53; that is, she testified earlier she was in the hospital in 1953.

Mr. Doepker: All right. We are not going to argue. Let the record show what she said.

(Deposition of Elsie Summers.)

Mr. Miller: That is right. Read the question.

(Question read.) [55]

The Witness: I don't remember.

Q. Well, it is either a yes or no answer. Will you please answer yes or no. A. No.

Q. It's not incorrect?

A. You mean if I was in the hospital in '53?

Q. Whether your earlier testimony that you have given here relating to being in the hospital in 1953 is the truth. A. No, I wasn't.

Q. It was not the truth?

A. No, I wasn't in the hospital.

Q. Then your answer is yes, it was not the truth?

A. It isn't. I wasn't in the hospital.

Q. Well, then, I take it, in conclusion, Mrs. Summers, that your complaint is the needle?

A. That's right.

Q. Would you have any recollection whether or not in July of 1952 you were admitted to the Wallace Hospital advising Doctor Bonebrake you only had had pains for approximately twenty-four hours prior to admission?

A. Will you repeat that question?

Mr. Miller: Read the question, please.

(Question read.)

The Witness: No, I don't recall that. [56]

Q. You have no recollection of that?

A. No.

Q. Being a practical nurse, as you have testified,

(Deposition of Elsie Summers.)

you have some knowledge of the makeup of the human anatomy, do you not?

A. Well, I don't work in surgery.

Q. Well, you have some general idea. Even a lawyer will gain some knowledge of it.

A. Yes.

Q. You understand that a hysterectomy is the removal of the uterus? A. Yes.

Q. You understand that yours was removed in 1951? A. Yes.

Q. And your testimony is that the needle cut, scarred, or hurt that uterus—that was not based upon memory? A. Yes, it was.

Q. What do you mean, Mrs. Summers? Would you please explain that?

(D.B.) A. Well, my uterus was scarred by the needle.

Q. Well, it was removed before the needle was there.

A. I didn't get your question. I answered wrong. I didn't get your question. That is the reason I answered wrong. Repeat your question.

Mr. Miller: Read the question to her. [57]

(Question read: "And your testimony is that the needle cut, scarred, or hurt that uterus—that was not based upon memory?")

The Witness: No, it wasn't.

Mr. Miller: That is all.

/s/ ELSIE SUMMERS.

(Deposition of Elsie Summers.)

State of Montana

County of Silver Bow—ss.

Subscribed and sworn to before me this 23rd day of September, A. D. 1958.

/s/ DAN BURKIRCH,

Deputy Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. [58]

Mrs. Elsie Summers requested the following corrections:

Page 8, line 17, to page 9, line should read:

I have not personally examined the records mentioned but I was present in Court while they were shown to Dr. Bonebrake and heard his testimony about the records.

Page 21, line 24: This is not "head injury"; it was "hand injury."

Page 22, line 4: This should be "hand injury."

Page 22, lines 7 and 8: Should be hand "injury."

Page 22, line 16: Should be regarding "hand injury"; not finger.

Page 23: Should refer exclusively to "hand injury"; not finger.

Page 24 down to line 10 is regarding hand injury.

Page 27, line 13: The answer should be "yes."

(Deposition of Elsie Summers.)

Page 28, line 17: The answer should explain that I went to the hospital at Kellogg, Idaho.

Page 49, line 22 to 25: This should read "the place where the uterus had been prior to removal."

Page 51, line 14: This should be "pain" instead of "faint."

Page 57, line 20: Should read "the place where the uterus had been prior to removal."

/s/ DAN BURKIRCH,

Deputy Clerk of the District Court of the Second
Judicial District of the State of Montana, in
and for the County of Silver Bow.

Certificate of Court Reporter

I, Robert E. Bruner, Do Hereby Certify that I am one of the District Court Reporters for the Eighth Judicial District of the State of Idaho; that I took down in shorthand the deposition of Elsie Summers before Harold E. Peterson, Deputy Clerk of the District Court, Kootenai County, Idaho, at Coeur d'Alene, Kootenai County, Idaho, on August 27th, 1958; and that the above and foregoing transcript is a full, true and correct record of the oral testimony of said witness given as aforesaid, and of all objections and/or stipulations made or entered into at said hearing.

(Deposition of Elsie Summers.)

I Further Certify that I am neither attorney for or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In Witness Whereof, I have hereunto set my hand this 30th day of August, A. D. 1958.

/s/ ROBERT E. BRUNER,
District Court Reporter, Eighth Judicial District
State of Idaho. [60]

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

This matter was tried before the Honorable Chase A. Clark, Chief Judge, United States District Court, sitting with a jury, at Coeur d'Alene, Idaho, on November 12, 1958, at 10:00 a.m.

Appearances: Doepker and Hennessey, Butte, Montana, James W. Ingalls, Esq., Coeur d'Alene, Idaho, Attorneys for Plaintiff; Hawkins and Miller, Coeur d'Alene, Idaho, Attorneys for Defendants. [1]*

* Page numbers appearing at foot of page of original certified Transcript of Record.

November 12, 1958, 10 A.M.

(Selection of Jury.)

(Opening Statement by Mr. Doepker.)

The Court: We will recess at this time before starting on the testimony, for fifteen minutes.

(Admonition to the jury.)

10:45 A.M., November 12, 1958

ELSIE SUMMERS

called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Doepker): Now, in giving your testimony I wish you would talk so that the jury and the Judge can hear it. I will start by asking you to tell the Court and jury your name?

A. My name is Elsie Summers.

Q. And where do you live Mrs. Summers, at the present time?

A. I live at 3036 Carter, Butte, Montana.

Q. How long have you resided in Butte, Montana? A. Since September 1955.

Q. What was the approximate date of your birth,—what year were you born?

A. I was born December 26, 1913.

Q. Have you been married? A. Yes. [3]

Q. What is your husband's name?

A. His name is Arthur L. Summers.

Q. When were you and he married?

A. August 2, 1930.

(Testimony of Elsie Summers.)

Q. And as a result of your marriage do you have any children? A. Yes.

Q. Will you, very briefly, name them and give their ages?

A. Eldon is the oldest, he is twenty-six; Wayne is the next and he is twenty-three; Keith is next and he is twenty-two; Gill is twenty-one and Marion, the youngest, is 19.

Q. Did you folks ever reside elsewhere beside Butte, Montana? A. Yes, sir.

Q. And where? A. Wallace, Idaho.

Q. Did you reside at other places beside Wallace, Idaho? A. Yes.

Q. Where was that?

A. It was Emmett, Idaho.

Q. Is that near Boise? A. Yes.

Q. Now, during this period of time that you have related to the jury, during the time that the children were born, did you obtain any training,—any special training of any kind? A. Yes. [4]

Q. What was the nature of that training?

A. It was training as a practical nurse.

Q. And approximately when did you start to take that training Mrs. Summers?

A. That was in 1939.

Q. During that time that you were taking this training as a nurse who was doing your housework? A. I, myself, was.

Q. These boys are they all in good health?

A. Yes.

Q. Now, Mrs. Summers, what was the condition

(Testimony of Elsie Summers.)

of your health, generally, during that period of time, we will say, up until approximately the year 1951? A. I was in good health.

Q. Did you do some practical nursing from time to time? A. Yes.

Q. Did something unusual, or did something happen in the year 1951? A. Yes.

Q. Relate briefly to the jury what that was, referring to the early part of the year 1951?

A. Well, around in 1951 I was menstruating and I seem to wouldn't quit and I just kept on and kept on and so I got a very severe backache through this menstruation and so I went to the [5] doctor in Wallace, Idaho and—

Q. All right now, up to that point,—before this time who had been your family physician?

A. Doctor Bonebrake.

Q. Is that Doctor Hubert E. Bonebrake, one of the defendants here? A. That's right.

Q. And during that period of time where was he practicing? A. Wallace, Idaho.

Q. And were there other doctors there at this same Wallace Hospital? A. Yes.

Q. That you had occasion to consult?

A. Yes.

Q. Do you remember their names? A. Yes.

Q. Will you tell the jury what they were?

A. Doctor Hunter and Doctor Ellis.

Q. Now, Mrs. Summers, you have related this matter that you have thus far told the jury, now,

(Testimony of Elsie Summers.)

you went to who, in connection with this trouble you were having?

Mr. Miller: To which we object, your Honor, on the ground that it is immaterial, not being within the time period of July 30, 1955 and July 7, 1957.

The Court: The objection will be sustained. [6]

Q. Now, then Mrs. Summers, at the time that you were in the—the time that you went to the hospital in 1951, what, if anything, was done?

Mr. Miller: Just a minute. Now, your Honor, I renew my objection that this testimony is incompetent and immaterial to any issue in this case. The inclusive dates are July 30, 1955 up until July 30, 1957.

Mr. Doepker: Your Honor made a ruling on that previously.

The Court: I made a ruling on that but I made a ruling on the complaint, the complaint was very indefinite. I made the ruling on the complaint, that the statute did not start to run until the date of the last treatment by the defendants here. In other words, that the date of the first operation would not be controlling and that as to her continuous treatment, it would be at the end of her continuous treatment. The Idaho Supreme Court has ruled a little differently in a great many decisions on it. This case depends on this question: When did she receive the last treatment from these doctors, and until that is established I would have to sustain the objection.

Q. Passing from the question we are now [7]

(Testimony of Elsie Summers.)

asking you Mrs. Summers,—when did you last see Doctor Bonebrake in connection with any matter,—back to the last time you saw him?

A. I seen Doctor Bonebrake in February 1956.

Q. And at that time, what, if anything did he do? A. He removed the needle.

Q. Do you have the needle now?

A. Yes, I have.

Q. Where did you obtain it?

A. From Doctor Bonebrake.

Q. At that time?

A. Right after I recuperated in the hospital I asked him if I could have it and he said “yes.”

Q. Where is that needle now?

A. It is in my possession now.

Q. Have you got it with you on the stand?

A. Yes.

Q. Will you produce it please?

(Witness produced article.)

(Plaintiff’s exhibit 1, marked.)

Q. There is being shown to you at this time Mrs. Summers, an object and the paper that it is attached to has been marked Plaintiff’s exhibit 1, will you state what that is?

A. It is a surgical needle. [8]

Q. You have been testifying about a needle that was handed to you by Doctor Bonebrake?

A. Yes.

Q. And is that the needle that was handed to you by him? A. Yes.

Q. As the needle that had been removed from you? A. Yes.

(Testimony of Elsie Summers.)

Q. Have you done anything with it except keep it since that time? A. I have not.

Mr. Doepker: We offer it in evidence.

Mr. Miller: Objected to as incompetent, irrelevant and immaterial. There is no contention in the complaint, or allegation in the complaint that the needle was wrongfully removed.

The Court: There is no allegation of any negligence on the part of the Doctor in removing this needle. The objection will be sustained.

Q. Going back now from the removal of that needle Mrs. Summers, how long did you treat with Doctor Bonebrake before this time in 1956?

A. Continuously through 1951 to 1956 until I moved to Butte.

Q. And what were you coming to him about?

A. I was worried, I was afraid of cancer. I had severe pains through my abdomen and across my hips. I couldn't stand; I couldn't walk; I couldn't sweep the floor and I was in misery all the time. I was crying all the time. I wasn't a housewife, I couldn't be. I wasn't a mother. I had seen so many cancer patients——

Q. ——All right now, how many times during this period of time did you consult with Doctor Bonebrake about this situation?

A. All the time. I was in constant care with him.

Q. And back from the year 1956 did you consult him continually about this matter,—about this trouble you are relating? A. Yes.

(Testimony of Elsie Summers.)

Mr. Miller: I object to the question as being indefinite and immaterial until the time is set and established,—what time they are talking about.

The Court: Yes, the time is the element in this case that will have to be considered.

Q. Well, now, go back and give to the jury your best memory of the times that you consulted with Doctor Bonebrake during this period of time about the subject you are testifying about?

A. Do you mean after my operation?

Q. Now, you have to come from the time you testified that the needle was removed back to the operation. [10] Give us the times that you saw him about it?

A. Well, in 1954 I was in constant care with him. In '53 I was in constant care with him and in '52 I was in constant care with him, always going back once and twice a month.

Q. And what about the year 1951?

A. In 1951 two months after the operation I was back with a severe pain in my abdomen.

Q. And during that period of time was that the thing that you were seeing Doctor Bonebrake about?

A. I was seeing Doctor Bonebrake about the severe pain I had. I didn't know what was wrong only I knew that I was suffering with severe pain and agony.

Q. Now, then, subsequent,—I mean before this period in 1956, did you have any other medical attention? A. No, sir.

(Testimony of Elsie Summers.)

Q. I mean in the year 1955?

A. In 1955 I was to the Wardner Hospital to see Doctor Cordwell over this same agony and pain, he took x-rays and he discovered the needle.

Q. All right, this x-ray that Doctor Cordwell took was taken at what time?

A. It was taken at 8 o'clock in the morning in 1955, August 5th.

Q. On the 5th day of August, is that right?

A. That's right. [11]

Q. Now then, after this time in 1955 what did you do then?

Mr. Miller: Now, your Honor, I object to this as incompetent, irrelevant and immaterial, and move to strike all the testimony of the witness on the ground that she has testified that the last time she saw Doctor Bonebrake or the other defendants was the year 1954 and the testimony therefore would be immaterial.

Mr. Doepker: The last time she saw him was in '56 your Honor.

The Court: The matter isn't exactly clear. I understood her testimony was 1951, '52, '53 and '54 she saw the Doctor and then she didn't consult him any more but changed doctors and then came back to him in 1956, is that right? The testimony is a little hazy the way she has been giving it.

Q. What about the year 1955 up until August, where were you at that time? Where were you living?

A. We were in Wallace, Idaho.

(Testimony of Elsie Summers.)

Q. And during this period of time were you not consulting Doctor Bonebrake? A. I was.

Q. Will you relate how it happened that you went to some other doctor?

A. Yes. My husband had changed jobs and I went to the [12] Wardner Hospital to Doctor Cordwell. I got a very sharp severe pain and I was paralyzed from my hips down, I couldn't—

Mr. Miller: Just a second. I object and move the answer be stricken as not being responsive.

The Court: The answer may stand.

Q. And was that the occasion that you went to see Doctor Cordwell? A. Yes.

Q. That you related? A. Yes.

Q. Now, Mrs. Summers, what was the start of this episode with Doctor Bonebrake, going back to the start that you were treating with him during this period of time?

Mr. Miller: To which I object, your Honor, as being incompetent, irrelevant and immaterial. There is no showing here that there has been any treatment by Doctor Bonebrake or the other defendants within the two-year period between the filing of the action and July 30, 1955.

The Court: The objection will be sustained.

Mr. Doepker: May we present a matter your Honor, out of the presence of the jury?

The Court: Yes. The jury will be [13] excused for a few minutes and I will hear counsel.

(In the absence of the jury:)

Mr. Doepker: Your Honor, we understand from

(Testimony of Elsie Summers.)

the testimony at this time, that the Plaintiff was under treatment by the Defendant up until a few days before this episode when she was taken over to the Wardner Hospital. This complaint was filed in July of 1957; that she had been continuously treating with Doctor Bonebrake up until this episode that she related on the 5th of August.

The Court: She hasn't fixed the time that she last treated with Doctor Bonebrake in connection with this operation that was performed on her in 1951.

Mr. Miller: Your Honor, I think there is a matter here that should come to the attention of the Court. There have been depositions taken in this case and they have been published. I understood the witness to state in answer to counsel's question that she was treated by Doctor Bonebrake in 1954, 1953 and 1952 and in 1951, which would be compatible to the testimony given on deposition. I refer to page 26 of her deposition where it is stated: "When, if anytime after that, did you contact Doctor Bonebrake or his associates at Wallace Hospital?" Her answer was: "I remember in 1954 I went back with the same back and abdomen pains. I was suffering something fiercely." [14]. She was thereafter asked,—on page 28 of the same deposition, as follows; having described a hospitalization with Doctor Gnaedinger: "Now, after that hospitalization, when was the next time you were hospitalized?" Her answer was: "I went back in August 1955." "At anytime between the time in

(Testimony of Elsie Summers.)

1954 and August 1955 did you seek medical care or help?" Her answer: "I decided to change doctors." She had gone to Doctor Cordwell. Now, I don't think we want to get into anything of a more serious nature than that. Your Honor, it is our position that only those treatments which can be shown to have occurred between the dates of July 30, 1955 and July 30, 1957, being the date of the filing of this action, would be competent or material evidence in this action.

The Court: That is the position the Court will take in the trial of this case. Mr. Bailiff, you may call the jury back.

(In the presence of the jury:)

Q. Mrs. Summers, in order to fix the definite time, now, between 1956 and between August 5, 1955 back toward '51 when did you last see Doctor Bonebrake about this trouble in your abdomen?

Mr. Miller: Your Honor, I am going to object to that as impeaching his own witness. She has already testified that November 1954 was when she was treated by Doctor Bonebrake. [15]

The Court: Well, maybe her testimony will be the same. She may answer.

A. As I said, I was in contact with Doctor Bonebrake through 1954, '53, '52.

Q. And what part of '55?

Mr. Miller: Objected to as leading and suggestive and attempting to impeach his own witness.

The Court: Yes, she said '54, '53 and '52. Don't lead your witness.

Mr. Doepker: Your Honor, that's the case, if that's the ruling.

The Court: I will have to abide by the ruling I have made. Any testimony regarding any negligence of these doctors prior to July 29, 1955, unless it was connected up with later negligence is barred by the Statute of Limitations, if that is your case——

Mr. Miller: Your Honor, I move to dismiss the complaint of the plaintiff and further move for entry of judgment in favor of the defendants according to law. Strike that please. I will move for the entry of summary judgment based upon the testimony of the plaintiff to the effect that 1954 was the last treatment by the defendants.

The Court: It is a matter of [16] procedure whether the jury should be instructed to bring in a verdict for the defendants.

Mr. Miller: Your Honor, I will withdraw my earlier motion.

Mr. Doepker: May I have a moment to confer with Mr. Ingalls?

The Court: Yes, you may. We will just be at ease.

Mr. Ingalls: May we have a brief recess? We may be able to bring out something further.

Mr. Miller: I don't think there is anything that can be brought out by the plaintiff in view of the record.

The Court: I don't see how a recess will help any. The Court has ruled that these acts of negligence against the defendants would have had to

have been after July 29, 1955. However, I will take a recess for ten minutes.

November 12, 1958, 11:30 A.M.

Mr. Doepker: Your Honor, we would like to make an offer of proof, if we may, at this time. We will write it out and present it to counsel and your Honor. Is that the practice you use here?

The Court: No, I can excuse the jury and you can dictate it into the record here. [17] The jury may be excused again for a few minutes and the bailiff will call you later.

(In the absence of the jury:)

Mr. Doepker: Now comes the Plaintiff and offers to prove by the witness on the stand and the testimony of her husband, Arthur Lee Summers, that the Wallace Hospital and Doctor Bonebrake, continued as the family physician of Plaintiff and her family until and including the month of July 1955, and that she did not discover that a surgical needle was imbedded in her abdomen until August 5, 1955, when an x-ray was taken by Doctor Cordwell, which disclosed the presence of the surgical needle which has been marked as an exhibit here and offered in evidence.

The Court: The fact that they were her doctors during the time that you have admitted or proposed in this offer,—I realize that there is a great weight of authority that the cause of action accrues at the time of the discovery and there seems to be a great weight of opinion that the statute doesn't start to run until the discovery but she has not testified to seeing these doctors before she trans-

ferred over to the other doctor. Her testimony is quite clear on it,—whether they remained as her physicians or not wouldn't make any difference. It would be a question of whether she consulted [18] with them in connection with this pain, and from the testimony here it is apparent that she didn't consult with them after July 29, 1955, until she returned to them for the operation, so I have to go along with the Supreme Court in their decision that some act of negligence on their part would have to be proved since July 29, 1955. You may recall the jury.

(In the presence of the jury.)

The Court: Ladies and gentlemen of the jury, it appears from the evidence in this case that there has been no act of negligence shown against the Wallace Hospital and the Doctors here since July 29, 1955. Under the law people are not allowed to have an action of this kind and let it lay dormant for such a long time. Plaintiff here is complaining about an operation in 1951, and the last treatment, it is admitted, that she received from these Doctors in connection with this first operation was prior to July 29, 1955. The operation where they removed the needle later,—there is no contention on the part of the Plaintiff that there was any negligence in that operation. That operation was satisfactory in every way. So there is only one thing that is left open to me and that is to advise the jury to find for the Defendants in this case. The Clerk will hand you a verdict. There will be no necessity for you [19] to retire. I will appoint Mr. Rich as foreman of the jury and he may sign the verdict.

Mr. Doepker: Your Honor, will you grant the Plaintiff an exception to the ruling of the Court?

The Court: You have that without the Court granting it. Whenever the Court is wrong you have an exception. You were relying entirely upon the discovery, I take it.

Mr. Doepker: We were relying on the fact that she didn't know anything about this needle until the 5th of August 1955.

The Court: There is some very good authority to support you in that, but it happens that the Supreme Court of Idaho says differently.

The verdict may be filed. Ladies and gentlemen of the jury, I want to thank you for the attention you have given this matter. I will excuse you at this time until two o'clock this afternoon. [20]

[Endorsed]: Filed January 26, 1959.

[Endorsed]: No. 16400. United States Court of Appeals for the Ninth Circuit. Elsie Summers, Appellant, vs. Wallace Hospital, Paul L. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership and Hubert E. Bonebrake, M.D., individually, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: January 29, 1959.

Docketed: March 10, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16400

ELSIE SUMMERS,

Plaintiff,

vs.

WALLACE HOSPITAL,

Defendant.

STATEMENT OF POINTS ON APPEAL

Plaintiffs-Appellants herewith present the points upon which they claim the Court erred:

1. In granting the defendants' motion to direct the jury to render a verdict for the defendants. (Pages 19 & 20, Transcript.)

2. In directing the jury to render a verdict for the defendants. (Pages 19 & 20, Transcript.)

3. In entering judgment that plaintiff take nothing by her complaint.

4. In restricting and limiting the evidence of plaintiff to acts or actions of defendants which occurred within two (2) years from the institution of suit, or between the dates of July 30, 1955, and July 30, 1957.

5. In rejecting plaintiff's offer in evidence of plaintiff's exhibit No. 1, which is set out in the Transcript on pages 8 and 9, as follows:

"Q. There is being shown to you at this time, Mrs. Summers, an object, and the paper that it is attached to has been marked 'Plaintiff's Exhibit 1.' Will you state what that is?"

“A. It is a surgical needle.

“Q. You have been testifying about a needle that was handed to you by Doctor Bonebrake?

“A. Yes.

“Q. And is that the needle that was handed to you by him?

“A. Yes.

“Q. As the needle that had been removed from you?

“A. Yes.

“Q. Have you done anything with it except keep it since that time?

“A. I have not.

“Mr. Doepker: We offer it in evidence.

“Mr. Miller: Objected to as incompetent, irrelevant and immaterial. There is no contention in the complaint, or allegation in the complaint, that the needle was wrongfully removed.

“The Court: There is no allegation of any negligence on the part of the Doctor in removing this needle. The objection will be sustained.”

6. In sustaining defendants' objections to testimony relating to acts of negligence of the defendants prior to July 30, 1955, which testimony and the objections and rulings are hereafter quoted:

“Q. Did something unusual, or did something happen in the year 1951?

“A. Yes.

“Q. Relate briefly to the jury what that was, referring to the early part of the year 1951?

“A. Well, around in 1951 I was menstruating and I seem to wouldn't quit and I just kept on

and kept on, and so I got a very severe backache through this menstruation and so I went to the Doctor in Wallace, Idaho, and——

“Q. All right now, up to that point,—before this time who had been your family physician?

“A. Doctor Bonebrake.

“Q. Is that Doctor Hubert E. Bonebrake, one of the defendants here?

“A. That’s right.

“Q. And during that period of time, where was he practicing?

“A. Wallace, Idaho.

“Q. And were there other Doctors there at this same Wallace Hospital?

“A. Yes.

“Q. That you had occasion to consult?

“A. Yes.

“Q. Do you remember their names?

“A. Yes.

“Q. Will you tell the Jury what they were?

“A. Doctor Hunter and Doctor Ellis.

“Q. Now, Mrs. Summers, you have related this matter that you have thus far told the Jury, now, you went to who, in connection with this trouble you were having?

“Mr. Miller: To which we object, your Honor, on the ground that it is immaterial, not being within the time period of July 30, 1955, and July 7, 1957.

“The Court: The objection will be sustained.

“Q. Now, then Mrs. Summers, at the time that

you were in the—the time that you went to the hospital in 1951, what, if anything was done?

“Mr. Miller: Just a minute, now, your Honor, I renew my objection that this testimony is incompetent and immaterial to any issue in this case. The inclusive dates are July 30, 1955, up until July 30, 1957.

“Mr. Doepker: Your Honor made a ruling on that previously.

“The Court: I made a ruling on that but I made a ruling on the complaint, the complaint was very indefinite. I made the ruling on the complaint, that the statute did not start to run until the date of the last treatment by the defendants here. In other words, that the date of the first operation would not be controlling and that as to her continuous treatment, it would be at the end of her continuous treatment. The Idaho Supreme Court has ruled a little differently in a great many decisions on it. This case depends on this question: When did she receive the last treatment from these Doctors, and until that is established I would have to sustain the objection.”

(Pages 5 through 7, Transcript.)

“Q. Now, Mrs. Summers, what was the start of this episode with Doctor Bonebrake, going back to the start that you were treating with him during this period of time?

“Mr. Miller: To which I object, your Honor, as being incompetent, irrelevant and immaterial.

There is no showing here that there has been any treatment by Doctor Bonebrake or the other defendants within the two-year period between the filing of the action and July 30, 1955.

“The Court: The objection will be sustained.”

(Page 13, Transcript.)

7. In rejecting plaintiff’s offer of proof. (Page 18, Transcript.)

8. In granting in effect, or in fact, defendants’ motion to limit evidence, dated November 5, 1958.

9. In holding the recovery for acts of negligence of the defendants prior to July 30, 1955, was barred by the statute of limitations.

Dated, June 16th, 1959.

DOEPKER & HENNESSEY,
/s/ By M. J. DOEPKER,
/s/ JAMES W. INGALLS,
Attorneys for Plaintiff-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 18, 1959. Paul P. O’Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

In reference to Rule 75-A of Federal Rules of Civil Procedure, the Plaintiff-Appellant hereby designates for inclusion in the Record on Appeal to the United States Circuit Court of Appeals for the 9th Circuit, taken by Notice of Appeal filed December 10, 1958, the following portions of the record proceedings and evidence in this action:

1. Complaint.
2. Motion to Dismiss.
3. Order overruling motion to dismiss.
4. Answer.
5. Motion to limit evidence to those actions and acts of the defendants or any of them which occurred within two (2) years from the institution of suit between the dates of July 30, 1955, and July 30, 1957; and to limit recovery upon such acts and actions of negligence of the defendants within said period, dated November 3, 1958.
6. Order denying motion of November 3, 1958.
7. Defendants' motion for a directed verdict.
8. Instructions to the jury directing the jury to render a verdict for the defendants.
9. Plaintiff's offer of proofs.
10. Judgment.
11. Notice of Appeal.
12. Appeal Bond.

13. Statement of Points on Appeal.
14. This Designation.
15. Transcript of trial.

Dated, June 16, 1959.

DOEPKER & HENNESSEY,
/s/ By M. J. DOEPKER,
/s/ JAMES W. INGALLS,
Attorneys for Plaintiff-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 18, 1959. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF
RECORD ON APPEAL

Comes now the Defendants-Respondents and pursuant to Rule 75 of the Federal Rules of Civil Procedure again request of the Clerk of the Court that in addition to the matters heretofore designated by the Plaintiff-Appellant designate the following matters to be included upon the record of appeal:

1. Clerk's record of minutes of hearing dated November 10, 1958, including order publishing depositions.
2. Clerk's record of minutes dated November 12, 1958.
3. Depositions of Dr. Bonebrake, Dr. Ellis, Dr. Cordwell and Elsie Summers.

Dated this 22nd day of June, 1959.

HAWKINS & MILLER,
/s/ E. L. MILLER,
A Member of the Firm,
Attorneys for Defendants-
Respondents.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 25, 1959. Paul P. O'Brien, Clerk.

